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89-1317

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL SHOPMEN PENSION FUND,
Petitioner,

v.

REUBEN MCDANIEL, JOE P. MARTIN, EILEEN HERRALA, JOSEPH GUENTHER, and HENRY MOSER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Ninth Circuit erred in ruling that the application of a pension plan provision that results in a loss of benefits but does not violate any express statutory mandate is nevertheless arbitrary and capricious, and therefore unlawful, unless the Trustees prove that the plan would become "financially unstable" but for the specific application.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner National Shopmen Pension Fund and its Trustees: A.S. Goodwin, Samuel Spadea, Dennis R. Toney, John Kerr, Kenneth Stewart, and W.J. Muse. Also parties below were Respondents Reuben McDaniel, Joe P. Martin, Eileen Herrala, Joseph Guenther, and Henry Moser. The Respondents represented a class consisting of similarly situated employees and former employees of the Fentron Corporation of Seattle, Washington.

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OPINION BELOW

The opinion of the Court of Appeals was initially entered on July 20, 1989. That opinion was withdrawn and an amended opinion was entered on November 17, 1989. A petition for rehearing with suggestion for rehearing *en banc* was denied on November 20, 1989. The initial opinion is reported at 879 F.2d 704; the amended opinion is reported at 889 F.2d 804. The opinion and order of the United States District Court for the Western District of Washington is unreported. The amended opinion of the Court of Appeals, its unreported order denying the petition for rehearing, and the opinion and order of the District Court are reproduced in the appendix.

JURISDICTION

The opinion of the Court of Appeals was initially entered on July 20, 1989. An amended opinion was entered on November 17, 1989. A timely petition for rehearing with suggestion for rehearing *en banc* was denied by the Ninth Circuit on November 20, 1989. This petition for writ of certiorari was filed within 90 days of the lower court's denial of rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves Section 404(a)(1)(A) of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 404(a)(1)(A). That provision states:

> Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan

STATEMENT OF THE CASE

A. Introduction

This matter is an ERISA action brought against Petitioner National Shopmen Pension Fund (frequently hereafter the "Shopmen Fund," "NSPF," or "Fund") and its six Trustees by a class of participants who are or were employees of Fentron Industries, Inc. (frequently hereafter "Fentron").[1] The Respondents are challenging

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[1] The complaint was filed in the United States District Court for the Western District of Washington on October 25, 1983.

action taken by the Trustees, following Fentron's 1977 withdrawal from the Fund as a participating employer, that had the effect of eliminating certain retroactive and conditional grants of unearned pension benefits.

The United States District Court for the Western District of Washington [2] initially granted summary judgment in favor of Respondents on September 6, 1985. That judgment was reversed by a panel of the Ninth Circuit on May 21, 1987 [3] and remanded for consideration of other unresolved issues. The District Court again granted summary judgment in favor of Respondents on February 29, 1988. That judgment was affirmed by the Ninth Circuit on July 20, 1989.[4] The Court's July 20, 1989 opinion was withdrawn and an amended order was entered on November 17, 1989. The Fund's Petition for Rehearing with Suggestion for Rehearing *En Banc* was denied on November 20, 1989.

B. Background [5]

1. *The Parties and Their Positions*

Petitioner National Shopmen Pension Fund is a multiemployer pension fund governed by ERISA. The Respondents are current and former employees of the Fentron Corporation, a manufacturer of building supplies and components located in Seattle, Washington. Fentron was a participating employer in the Fund from 1970 until its withdrawal in May 1977.

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[2] The District Judge was the Honorable John C. Coughenour.

[3] The panel consisted of the Judges Wallace, Fletcher, and Brunetti.

[4] This second panel consisted of Judges Goodwin, Wright, and Norris.

[5] The facts set forth herein are from Petitioner's cross-motions for summary judgment, and affidavits and exhibits in support thereof. Unless otherwise noted, they were not contested below.

Pursuant to a plan rule, the Trustees of the Shopmen Fund reduced certain retroactively and conditionally granted unearned benefits of the Respondents. The reduction was deemed necessary to protect the benefit security of the Fund's 17,000 other participants after an actuarial study disclosed that Fentron's withdrawal resulted in unfunded benefit liabilities in excess of $500,000 being dumped upon the Fund.[6] Respondents challenged the benefit reduction by this lawsuit.

2. *The Shopmen Fund's Benefit Structure*

Under the Shopmen Plan, the amount of benefit that an eligible participant normally would receive upon his or her retirement is determined by a formula that takes into account two variables: (a) the hourly contribution rate (or rates) paid by the participant's employer(s), and (b) the number of years of employment service credited to the participant. Each contribution rate corresponds to a specific benefit level which, when multiplied by the number of years of credited service, yields the amount of a participant's monthly retirement benefit. The benefit level/contribution rate ratios are set by the Trustees in consultation with the Fund's actuaries. The ratio applicable here is 32 cents of benefits for each cent contributed by the participant's employer.

The amount of a participant's retirement benefit increases in direct proportion to any increase in the rate at which the participant's employer contributes to the Fund. Similarly, an employee's benefit increases as his or her years of credited service increase.[7]

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[6] Because Fentron's withdrawal preceded the 1980 Multiemployer Pension Plan Amendments (MPPA), no action to collect withdrawal liability could be brought against it. Most of the unfunded liabilities dumped by Fentron were attributable to the unearned benefits retroactively and conditionally granted to the company's work force.

[7] A participant with 15 years of credited service with an employer who contributes to the Fund at the rate of 25 cents per hour

3. *The Shopmen Fund's Practice of Granting Retroactive Benefits*

Although it is not required to do so by any law, the Shopmen Plan has long maintained the practice of granting two types of retroactive benefits in order to provide the maximum benefits possible to older workers. The first type derives from the Fund's policy of regularly granting service credit to the employees of a newly contributing employer for their service with that employer *before* the employer first became contractually obligated to make contributions on their behalf. This is known as precontributory service credit, or "past service credit." The grant of past service credit makes it possible for older employees in the work force of a new contributor to receive a significantly greater pension benefit than they would receive if pensions were based solely on contributory credit. Indeed, many workers might never receive a pension benefit of any sort were it not for the granting of past service credit.

The second type of retroactive benefit granted by the Fund is its application of the highest possible benefit level to all years of credited service. Over the years, the contractual rate at which an employer contributes to a fund usually increases. Many multiemployer pension plans apply the benefit level associated with a particular contribution rate *only* to the years when that rate was in effect. The Shopmen Plan, however, applies the benefit level associated with the highest contribution rate paid by the participant's employer to *all* years of credited service. As a result, older workers are likely to collect significantly greater retirement benefits than they might otherwise receive.

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would receive, at retirement, a benefit of $120 per month (i.e., 15 x 25 x .32). If, however, the employer's hourly contribution rate is 50 cents and the participant has 25 years of service, the monthly benefit becomes $400 (i.e., 25 x 50 x .32).

In essence, both forms of retroactive benefits are unearned. In the first case, benefits are granted for periods during which no employer contributions were made. In the second, greater benefit levels are applied to periods during which the actual benefits earned were in a lesser amount (i.e., because the employer's actual contributions were sufficient only to fund a lower level of benefits).

No law requires that either form of retroactive benefits be provided. Indeed, no law requires that pension plans automatically increase the applicable benefit level as an employer's contribution level rises.[8]

4. *The Conditional Granting of Retroactive Benefits*

The granting of these retroactive benefits is very costly to a fund because, in both cases, benefit obligations are immediately created for which no funds have yet been received. But since the relationship between a contributing employer and a fund normally continues for many years, it is expected that the unfunded liabilities thus created will be amortized over a period of time by the continuing stream of contributions from the employer. The contribution rates associated with the various Shopmen Plan benefit levels are actuarially determined to ensure the full funding of current benefit accruals and to amortize, over a period of 30 years, the liabilities for the retroactively granted benefits.

So long as the employer continues to make contributions on behalf of its work force at the expected pace and in the expected volume, these unfunded liabilities will eventually become fully funded. But if the employer withdraws from the fund before this occurs (as did the Respondents' employer here) or if some other actuarially significant event occurs that will effectively prevent the

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[8] ERISA Section 204(b)(4)(a), 29 U.S.C. § 1054(b)(4)(a) and Internal Revenue Code Section 411(b)(3) expressly allow plans to ignore precontributory service for accrual purposes.

retroactive benefits from ever becoming funded, the unfunded liabilities will be "dumped" upon the fund.

A single withdrawal and consequent liability dumping might not significantly damage a fund. However, the cumulative effects of such dumping could seriously erode its financial integrity and, therefore, the benefit security of all the fund's participants. The unfunded liabilities left by a withdrawing employer would have to be absorbed by increased contributions made on behalf of other employee groups.[9] The diversion of these contributions would adversely affect the possibility of future benefit increases for those participants. And if the extent of the dumping was sufficiently severe, benefit levels for future accruals for all employee groups would have to be reduced until the dumped liabilities have been amortized. Indeed, the occurrence of a series of withdrawals (where withdrawal liability is uncollectible, as it often is) might so jeopardize the financial underpinnings of a fund as to require its termination.

To balance their goal of providing more meaningful benefits to older workers with their fiduciary obligation to protect the benefit security of all participants, multiemployer plans make the grant of such retroactive benefits *contingent* upon the employer's continued participation in the fund or upon the continued existence of a positive actuarial balance between anticipated cost of such benefits and expected revenues. The Shopmen Plan follows this pattern.

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[9] The NSPF has always treated each employee group separately for actuarial purposes. Hence, it adopted as its method of determining withdrawal liability under the 1980 Multiemployer Pension Plan Amendments to ERISA the direct attribution method of calculation. ERISA Section 4211(c)(4), 29 U.S.C. § 1391(c)(4). Under this method, there is no pooling of benefit liabilities and assets. An employer's withdrawal liability is based entirely upon the liabilities attributable to its work force and upon its own contributions (and earnings thereon).

The provisions in the Shopmen Plan that make these grants conditional are Sections 2.09 and 2.10. Section 2.09 permits the Trustees to cancel past service credit for purposes of benefit accrual should an employer's withdrawal from the Fund result in the dumping of unfunded liabilities.[10] Section 2.10, which was the specific provision at issue below, empowers the Trustees to scale back the benefit level for a particular employee group to the level associated with an earlier (lower) contribution rate whenever they observe an actuarial imbalance developing between the cost of the retroactive benefits resulting from contribution rate increases and the additional revenue anticipated from the employer.[11]

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[10] Section 2.09 provides as follows:

> (a) If an Employer's participation in the Fund with respect to a bargaining unit or group terminates, the Trustees are empowered to cancel any obligation of the Trust Fund that is maintained under the Trust Agreement with respect to that part of any pension for which a person was made eligible on the basis of employment in such bargaining unit or group prior to the Contribution Period with respect to that unit or group. Neither shall the Trustees, Employers, nor the Union be obligated to make such payments.

[11] Section 2.10 states:

> The Trustees reserve the right to reduce the portion of the pension which is attributable to any increase in the contribution rate which increase was agreed upon subsequent to the original Collective Bargaining Agreement providing for contributions to the Fund in order to preserve an actuarially sound relationship between the contributions anticipated from the particular Employer as a result of said increased contribution rate and the projected benefits to be paid to Participants of the Employer as a result thereof.

Although both Sections 2.10 and 2.09 appear to be discretionary, the Trustees' fiduciary obligation to protect the benefit security of all participants requires that they be implemented in all instances of liability dumping that are not *de minimis*. One or the other provision has been used whenever a withdrawing employer dumped unfunded liabilities. *Stewart v. National Shopmen Pension Fund*, 795 F.2d 1079, 1091 (D.C. Cir. 1986).

The most common cause of such an actuarial imbalance is an employer's withdrawal from the plan, as occurred here. In most instances, the unfunded liabilities dumped by a withdrawal are as likely to be attributable to the retroactive application of an enhanced benefit level as to the grant of past service credit.[12]

A trustee can never be certain that a participating employer will remain with a plan long enough to amortize all retroactively granted benefits. Without provisions like Sections 2.09 and 2.10 to fall back on, a trustee who guesses wrong about the longevity of an employer could anticipate being the object of suit by some participant or participant class for breach of fiduciary duty whenever a withdrawal resulted in the dumping of unfunded liabilities and withdrawal liability was uncollectible. Therefore, it is unlikely that a plan would grant retroactive benefits of any sort *without* the presence of actuarial safety valves such as Sections 2.09 and 2.10. The financial risks inherent in such grants (and, therefore, the potential fiduciary liability of the plan's trustees) would otherwise be intolerable.

Sections 2.09 and 2.10 are fundamental to the Shopmen Plan's overall design and to the funding assumptions underlying it. They reflect the conscious policy choices and compromises made by the Plan's Trustees in balancing competing concerns. The Trustees were clearly anxious to aid older workers; however, they were also equally concerned that the benefit security of participants not be compromised. In their view, any actuarial imbalance caused by liability dumping would be more equitably remedied by curtailing the retroactively granted unearned benefits of the withdrawing employer's work force

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[12] When substantial past service credit is granted, as it was to Fentron's work force, the cost impact of the retroactive application of a higher benefit level is even greater. The new benefit level is applied to years of past service as well as to those in which the employer actually contributed.

than by diverting contributions made on behalf of other employee groups and thereby jeopardizing the benefit security of all.

C. Pertinent Decisions of Other Courts

Section 2.09 of the Shopmen Plan, the companion provision to Section 2.10, was held to be lawful by the United States Court of Appeals for the District of Columbia Circuit in *Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 834 (1984) (*Stewart I*). That provision, the court stated, embodies "a permissible goal of multiemployer funds," and "to the extent that cancellation [of past service credit] is necessary to avoid the dumping of substantial unfunded liability it is presumptively reasonable." [13]

The rule's specific application to reduce the retroactively granted benefits of employees of an employer whose withdrawal resulted in liability dumping was sanctioned in a second opinion by that court: *Stewart v. National Shopmen Pension Fund*, 795 F.2d 1079 (D.C. Cir. 1986) (*Stewart II*).[14] In *Stewart II*, the plaintiffs contended that, notwithstanding the general lawfulness of Section 2.09, it was nevertheless arbitrary and capricious for the Shopmen Trustees to reduce their benefits, given that their employer's withdrawal would not itself have

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[13] The court also rejected the plaintiffs' claim that the elimination of past service credit was an unlawful amendment to the Plan's vesting schedule. The plaintiffs, the court observed, failed to understand the difference between the concepts of "vested rights" and "accrued rights." "A reduction in benefits to employees whose right to a pension in some amount remains vested is not a "forfeiture." 730 F.2d 1552, 1561.

[14] Justice Scalia was a member of the panel in that case. The other panel members were Judges Silberman and Wright. *Stewart II* is reproduced for the convenience of the Court in the appendix at pp. 35a-43a.

caused the Fund to become "actuarially unsound." The court rejected their argument:

> Appellants argue that . . . [the defendant trustees are] obliged . . . to prove that cancelling past service credits *in this instance* was necessary to protect the "actuarial soundness" of the Fund. That position both misreads our prior opinion and misapplies our standard of review. By concluding that the cancellation of past service credits to avoid the dumping of unfunded liability is presumptively reasonable, this Court necessarily concluded that such a rule (or, in this case, a practice authorized by a rule) serves ultimately to protect a fund's actuarial soundness: "When a fund is obligated to pay out more money than has been paid in, and it is unable to recoup the difference, '[t]hese excess benefits would have to come largely from the stepped-up contributions of current participants.' " [citation omitted]
>
> Forcing the Fund to prove that such a practice is actually "necessary" to preserve its actuarial soundness, as opposed to merely conducive to that purpose, would impose a virtually impossible burden of proof on the Fund. This is particularly so because the actuarial soundness of a fund is a concept that—unlike a balance sheet—does not refer to a static picture. * ** * In any event, the judiciary is neither competent to make such evaluations nor authorized to review a trustee's actions under a test that exceeds the arbitrary and capricious standard. The appellant, in effect, would have this Court abjure our limited standard of review in favor of a test more nearly resembling strict scrutiny. Our cases do not permit such a departure. In short, having held that the Fund's policy of cancelling past service to avoid dumping of unfunded liability is presumptively reasonable, this Court has already implicitly rejected appellants' motion that the Fund is obliged to satisfy a court's independent assessment that the policy is strictly necessary to preserve actuarial soundness. It follows that the Fund is not obliged

> to show that its policy's application *to these facts* is justified by the need to protect the actuarial soundness of the Fund.

795 F.2d at 1079, 1083. The *Stewart* decisions subsequently have been followed by the Eighth Circuit in *Niagara of Wisconsin Paper Corp. v. Paper Industry Union Management Pension Fund*, 800 F.2d 742 (8th Cir. 1986).

D. The Relevant Proceedings Below

The District Court initially granted summary judgment in favor of Respondents on September 6, 1985.[15] It did so on the basis of "a single legal conclusion": that the Trustees had interpreted Section 2.10 too expansively. Section 2.10, the Court held, could not be interpreted to authorize the Trustees to reduce benefits to remedy an actuarial imbalance (or dumping) caused by an employer's withdrawal. Because the Trustees misinterpreted the provision, the Court ruled, their application of it to the Fentron employee group was arbitrary and capricious and therefore void.

Although it ruled against the Fund, the Court nevertheless made several significant factual and legal findings that are relevant to this petition and that have never been challenged. The Court expressly found that Fentron's withdrawal from the NSPF created "an immediate and financially substantial" actuarial imbalance. It further found that the goal of avoiding the dumping of unfunded liability is a permissible one and, indeed, an "essential responsibility of [multiemployer] fund trustees." Finally, it found that, as a matter of law, the Shopmen Trustees had not acted in bad faith and that the action they took to avoid the unfunded liability dumped by Fentron "was supported by substantial evidence, upon an adequate factual foundation."

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[15] The District Court's decision and order is reproduced in the appendix at pp. 6a-13a. It is reported at 6 E.B.C. 2700.

Because it ruled that the Plan did not authorize the Trustees' actions, the Court found no need to address the Plaintiffs' other contentions that the Trustees' conduct violated the terms of ERISA or was otherwise arbitrary and capricious. It did, however, grant summary judgment for the Trustees individually, finding, as a matter of both law and fact, that the Trustees acted in good faith by attempting to meet their "essential responsibility" to "avoid unfunded liabilities." *Id.*, pp. 7-8, App. 11a-12a.

On May 21, 1987, a panel of the United States Court of Appeals for the Ninth Circuit reversed the District Court. The appellate court held that the Trustees' interpretation—that Section 2.10 authorized them to reduce retroactively granted benefits to cure the actuarial imbalance (i.e., the liability dumping) caused by Fentron's withdrawal from the Plan—was a reasonable one.[16] Because the Trustees' interpretation was reasonable, the court ruled, the trial court was obligated to defer to it.

On February 29, 1988, the District Court again entered summary judgment for Respondents.[17] Although it rejected Respondents' contention that the Trustees' use of Section 2.10 to scale back the benefit level for Fentron employees was a "plan amendment" that reduced "accrued benefits" in violation of ERISA Section 204(g), 29 U.S.C. § 1054(g), it also held that the application of Section 2.10, even if that provision did not violate any express provision of ERISA, was arbitrary and capricious. Finally, it ruled that the Trustees were precluded from enforcing Section 2.10 because they had breached a fiduciary duty owed Plaintiffs by failing to publish an adequate summary plan description.

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[16] The text of the appellate court's opinion is reproduced in the appendix at pp. 14a-23a. It is reported at 817 F.2d 1370.

[17] The District Court's second decision and order is reproduced in the appendix at pp. 24a-34a.

E. The Ruling Below

The Ninth Circuit affirmed the second entry of summary judgment on July 20, 1989. An amended opinion was issued on November 17, 1989.[18] Stating that it was bound by the principles it had established in *Elser v. IAM National Pension Fund*, 684 F.2d 648 (9th Cir. 1982), *cert. denied*, 464 U.S. 813 (1983), the circuit court held that the Shopmen Fund could not apply Section 2.10 and thereby reduce the Plaintiffs' benefits unless the unfunded liability dumped by Fentron would by itself have caused the plan to become financially unstable.[19] Since, the court observed, the Fund did not contend that the $500,000 of unfunded liabilities resulting from Fentron's withdrawal would by itself have made the Fund financially unsound, the instant use of its rule was therefore arbitrary and capricious. As additional support for its ruling, the court commented that rules such as Section 2.10 had been made unnecessary by the 1980 passage of the Multiemployer Pension Plan Amendments Act.[20]

The Fund timely filed with the Ninth Circuit a petition for rehearing with suggestion for rehearing *en banc*. That petition was denied on November 20, 1989.

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[18] The court's amended opinion is reproduced at pp. 1a-4a of the appendix. The amended opinion is reported at 889 F.2d 804; the court's original opinion is reported at 879 F.2d 704.

[19] The term "financially unstable" has no generally accepted meaning either in the field of pension law or among pension consultants, accountants, or actuaries. Presumably, the appellate court used it synonymously with the term "actuarially insolvent."

[20] Although the issue had been appealed and extensively briefed, the court of appeal's decision never addressed the district court's ruling that the Shopmen Trustees had violated ERISA's summary plan description rules.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE NINTH CIRCUIT BELOW HAS CREATED CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS THAT REQUIRES RESOLUTION

By itself, the Ninth Circuit's *de facto* voiding of a plan provision designed to protect the Shopmen Fund and its participants from the dumping of unfunded liabilities by withdrawing employers merits review. However, review is merited too because the lower court's decision has an importance that far transcends its specific holding. That importance arises from the fact that the appellate court, in order to reach its legal conclusions, devised and then applied to the Trustees' implementation of Section 2.10 an entirely new standard of judicial review. Both the court's narrow ruling and the standard it created are in conflict with the rulings of other circuits.

Clearly, the court's prohibition of the use of an important anti-dumping provision that is an integral part of the Shopmen Plan's actuarial design clashes with the decision of the District of Columbia Circuit in *Stewart v. National Shopmen Pension Fund*, 795 F.2d 1079 (D.C. Cir. 1986), which sanctioned the Trustees' application of a companion (and substantially similar) provision to the one at issue here. Indeed, the appellate court conceded as much:

> We recognize that our circuit is in apparent conflict with the D.C. Circuit, which has held that a fund may reduce benefits to recoup unfunded liabilities, regardless of any threat to the overall financial stability of the fund.

App. 3a-4a. But event more importantly, the standard of review adopted by the Ninth Circuit is both a radical departure from and in glaring conflict with the tests employed by the District of Columbia and Eighth Cir-

cuits in determining the lawfulness of plan provisions that do not violate any explicit requirement of ERISA.

A. The Standard of Review Devised by the Ninth Circuit in This Matter Is in Direct Conflict with That Employed by the District of Columbia and Eighth Circuits

Over the years, the federal courts frequently have been called upon to resolve challenges to specific employee benefit plan rules that did not violate any express requirement of ERISA. Such challenges have been of two kinds.

The first involves allegations that a plan rule, although not expressly proscribed by any statutory language, nevertheless is unlawful and therefore unenforceable under any circumstance. The courts, in striking down such rules, have applied a standard of review generally centering around a determination as to whether the challenged rule results in the ineligibility for, or the loss of benefits by, a significant percentage of at plan's participants. When the court cound that a contested rule had such a result, it shifted the burden to the plan to demonstrate that the rule nevertheless had a "reasonable" purpose. E.g., *Ponce v. Construction Laborers Trust Fund*, 628 F.2d 537 (9th Cir. 1980); *Hurn v. Retirement Trust Fund of the Plumbing, Heating and Piping Industry*, 703 F.2d 386, 390 (9th Cir. 1983); *Whipp v. Seafarers Vacation Plan*, 832 F.2d 853 (4th Cir. 1987); c.f., *Roark v. Lewis*, 401 F.2d 425, 428 (D.C. Cir. 1968). If they concluded that the plan had not adequately demonstrated such a reasonable purpose, courts generally held the challenged provision to be "arbitrary and capricious" and therefore violative of ERISA's general requirement that employee benefit plans be administered for the "exclusive purpose of . . . providing benefits to participants and their beneficiaries."[21] *Van Boxel v.*

[21] See ERISA § 404(a)(1)(A)(i), 29 U.S.C. § 1104(a)(1)(A)(i).

Jounal Co. Employees Pension Trust, 836 F.2d 1048, 1052 (7th Cir. 1987); see also discussion of the source of the arbitrary and capricious standard set out in *Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d 134, 141-142 (3d Cir. 1987), *reversed* in *Firestone Tire and Rubber Co. v. Bruch*, —— U.S. ——, 109 S.Ct. 948 (1989). Examples of such cases are the voiding of vesting [22] and break-in-service [23] rules.

The second context in which disputes over such rules have arisen involves challenges to their specific application. Plaintiffs in these cases contend, as do the respondents in this matter, that an otherwise valid plan rule cannot lawfully be employed because the specific application challenged was itself "arbitrary or capricious." [24]

This Court has never ruled on the question of what standard of review ERISA requires the judiciary to use in determining whether the application of an employee benefit plan provision that results in the reduction or loss of benefits but that does not violate any express language of ERISA is nevertheless unlawful. Indeed, this Court has yet to address squarely the question of whether, and under what standard of review, the courts,

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[22] *Phillips v. Alaska Hotel and Restaurant Employees Pension Fund*, No. C68-1386WD (W.D. WA 1989), 1989 U.S. District Lexis 15101.

[23] *Ponce v. Construction Laborers Pension Trust*, 774 F.2d 1401 (9th Cir. 1985); *Seafarers Pension Fund v. Sturgis*, 630 F.2d 218 (4th Cir. 1980).

[24] *Central Tool Co. v. IAM Pension Plan*, 523 F. Supp. 812 (D.D.C. 1981), *reversed on other grounds*, 811 F.2d 651 (D.C. Cir. 1987). In *Central Tool*, the district court held that a past service disregard rule similar to § 2.09 of the Shopmen Plan could not be applied because the IAM Plan had not determined whether Central Tool's withdrawal actually had dumped any unfunded liabilities on the plan. Without such knowledge, the court stated, the rule's application was arbitrary and capricious.

under ERISA, may ever invalidate plan provisions that do not expressly violate statutory mandates.

The Court, in *Firestone Tire and Rubber Co. v. Bruch*, —— U.S. ——, 109 S.Ct. 948 (1989), has recently considered the standard of judicial review and deference appropriate to trustee interpretation of arguably ambiguous plan provisions.[25] However, the last decision by this Court concerning the standard under which courts may review the basic legality of benefit plan rules not directly at odds with a statutory mandate was *United Mine Workers Health and Retirement Fund v. Robinson*, 455 U.S. 562 (1982). *Robinson* involved a challenge pursuant to Section 305(c) of the Taft-Hartley Act, 29 U.S.C. § 186(c), to amendments made to a United Mine Workers' medical plan that effectively disenfranchised an entire class of persons previously eligible for benefits.

The Taft-Hartley provision at issue in *Robinson* includes the requirement that welfare and pension plans be for the "sole and exclusive benefit of employees . . . and their families and dependents." This Court, in *Robinson*, rejected the view then held by several courts of appeals that this statutory language, which is similar to language in Section 404(a)(1)(A)(i) of ERISA, 29 U.S.C. § 1104(a)(1)(A)(i), imposed a requirement that all employee benefit plan provisions satisfy a test for reasonableness. The "sole and exclusive benefit" language of Section 305(c), the Court observed, was adopted to ensure that employer moneys are contributed to legitimate trust funds. It is, the Court held, an anti-corruption statute that was never intended to be used as the basis for judicial review of fundamental plan rules. The provision, the Court emphasized,

> is no general requirement that the complex schedule of the various employee benefits must withstand ju-

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[25] This type of review, it should be noted, differs markedly from review of the underlying lawfulness of the provision itself.

dicial review under an undefined standard of reasonableness.[26]

There is legislative history suggesting that, as is the case with Taft-Hartley, the "sole and exclusive benefit" language in ERISA was not intended to be a source of authority under which the federal courts could strike down as arbitrary and capricious, or unreasonable, employee benefit plan provisions that did not violate any of ERISA's specific commands.

ERISA's "sole and exclusive benefit" language, which is also contained in Section 401(a)(2) of the Internal Revenue Code, appears to be an incorporation both of longstanding prior tax law and the Taft-Hartley Act.[27]

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[26] 455 U.S. at 574. Explaining why a "reasonableness" standard is an inappropriate test for reviewing basic plan rules, the court stated:

> [B]ecause finite contributions must be allocated among potential beneficiaries, inevitably financial and actuarial considerations sometimes will provide the only justification of an eligibility condition that discriminates between different classes of potential applicants for benefits.

Several appellate courts have sought to narrow the effect of *Robinson* by holding that the case stands solely for the proposition that a reasonableness or "arbitrary and capricious" standard of review of plan provisions is precluded only when the challenged rule is the result of collective bargaining. *Elser v. IAM National Pension Fund*, 684 F.2d 648 (9th Cir. 1982), *cert. denied*, 464 U.S. 813 (1983); *Murn v. United Mine Workers of America 1950 Pension Trust*, 718 F.2d 359, 361 (10th Cir. 1983); *Sellers v. O'Connell*, 701 F.2d 575, 577 (6th Cir. 1983); *Central Tool Co. v. IAM National Pension Fund*, 811 F.2d 651, 656-659 (D.C. Cir. 1987). In doing so, however, they have failed to articulate any meaningful rationale as to why this Court's analysis in *Robinson* is not equally applicable when the challenged rule is the product of the considered plan design choices made by trustees.

[27] The great bulk of provisions in Title I of ERISA are duplicated in federal tax law and should generally be construed *in pari materia* with them. See *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 and n.1 (1980).

The requirement initially was imposed upon pension trustees in the 1926 tax code. Section 219(f) of the Revenue Act of 1926. See, subsequently, Revenue Act of 1928, § 165; Internal Revenue Code of 1939, § 165(a); and Internal Revenue Code of 1954, § 401(a)(2) (1954). These tax provisions were designed to prevent an employer who makes tax-deductible contributions to a tax-exempt benefit plan from being able to divert plan funds to his own use. Under the implementing regulations, a pension plan satisfied the "exclusive benefit" test if it prevented the employer from diverting trust assets to its own use. See Treas. Reg. § 1.401(a)(2) (1964).

Nothing in the provision's more recent history supports a conclusion that its purpose was amended to transform it into a standard of judicial review of plan rules otherwise in compliance with the Code and ERISA. The House-Senate Conference Report suggests that what Congress continued to have in mind was insuring that plan monies never be diverted to the personal use of employers:

> Since the assets of the employee benefit plan are to be held for the exclusive benefit of participants and beneficiaries, plan assets generally are not to inure to the benefit of the employer.

Conference Report on Employee Benefit Security Act of 1974, House Rep. 93-1280, 93d Cong., 2d Sess., p. 303, reprinted in *Legislative History of the Employee Retirement Income Security Act of 1974*, U.S. Govt. Printing Office, 1976, p. 4570. To the best of Petitioner's knowledge, no court has, as yet, considered these authorities or explained how Congress' "comprehensive and reticulated statute,"[28] nevertheless left so much vague authority over pension policy to the judiciary.

As a result of the Ninth Circuit's rulings below, the time has now come for this Court to consider what stand-

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[28] *Nachman Corp. v. Pension Benefit Guaranty Corp.*, *supra*, at 446 U.S. 359, 361 (1980).

ard of judicial review is to be employed in ERISA-based challenges to plan rules not expressly proscribed by ERISA—if, indeed, any review is permissible. Its attention is essential since the lower court's adoption of its standard of review, which is significantly more extreme than the one rejected in *Robinson*, has created a fundamental split among the circuits that cries out for resolution.

The District of Columbia and Eighth Circuits hold that a plan rule that results in a loss or reduction of benefits but has a reasonable purpose may be applied so long as the particular instance of application will further the rule's purpose. *Stewart II*, *supra*; *Niagara of Wisconsin Paper Corp. v. Paper Industry Union Management Pension Fund*, 800 F.2d 742, 747 (8th Cir. 1986). The Ninth Circuit, in contrast, does not regard it as significant that a plan provision has a reasonable purpose or even that a specific application would advance that lawful purpose. It holds instead that the enforcement of a plan rule that results in the reduction or loss of benefits may occur *only* if the fund would become financially unstable but for the specific application of the rule. Unless the application would prevent the plan from becoming "financially unstable," the court states, its implementation must be regarded as "arbitrary or capricious" and therefore unlawful.

The District of Columbia and Ninth Circuits' treatment of the Shopmen Plan's two anti-dumping rules (Sections 2.09 and 2.10) graphically illustrates the differences in the tests.[29] Neither of the challenged provi-

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[29] Although the plan rule challenged in the *Stewart* cases (Section 2.09) was not the same as that challenged here (Section 2.10), the two are substantially similar. Both are designed to enable the Trustees to protect participants generally from liability dumping by withdrawing employers by permitting the reduction or elimination of retroactively (and conditionally) granted unearned benefits. Further, both were applied only after an actuarial study commissioned by the Trustees demonstrated that the withdrawal of the

sions violated any specific statutory language. And both Circuits had held previously that plan rules that permit the reduction or elimination of retroactively granted and unearned benefits of an employer's work force so as to avoid the dumping of unfunded liabilities due to that employer's subsequent withdrawal serve a legitimate purpose. *Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552, 1566 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 834 (1984)[30]; *Elser v. IAM Pension Fund*, 684 F.2d 648, 657 (9th Cir. 1982), *cert. denied*, 464 U.S. 813 (1983). Even the District Court in this matter conceded the legitimate purpose of Section 2.10, a ruling to which the appellate court never voiced objection.[31] It was, moreover, undisputed in both *Stewart* and the instant case that the withdrawals of the plaintiffs' respective employers would actually result in the dumping of substantial unfunded liabilities on the Shopmen Fund but for the application of the challenged rules.[32] Such widely disparate treatment of substantially similar applications of fundamentally similar plan provisions should not be tolerated by this Court.

The state of conflict among the circuits will also have severe administrative consequences to the judiciary. The inevitable effect of the Ninth Circuit's ruling will be forum shopping of the most blatant sort by ERISA plaintiffs. It seems only obvious that a plan participant challenging the application of a plan rule that results in a loss or reduction of benefits will do anything possible to ensure that the challenge is brought within the Ninth

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employers involved actually resulted in the dumping of unfunded liabilities.

[30] See the discussion at pp. 10 and 12, *supra*.

[31] See the quotation from the Court's 1985 opinion at p. 12, *supra*.

[32] *Stewart, supra*, at 795 F.2d 1084; *McDaniel v. National Shopmen Pension Fund*, 6 E.B.C. 2700, 2704 (W.D. WA 1988), app. 11a. "In the present case it is undisputed that the Fund undertook an actuarial study concerning Fentron's withdrawal which revealed a substantial unfunded liability."

Circuit. This is so because that court's new standard of review will almost always redound to the participant's advantage.

In the Ninth Circuit, plaintiffs need no longer bother with proof that a plan provision has a disproportionate effect on a class or group of similarly situated persons. And district courts need no longer be concerned with the actuarial design of a plan or with how the challenged provision relates to that design. In the Ninth Circuit, participants need only allege that their plan will not become "financially unstable" [33] if the challenged rule is not applied to them. Very seldom will a plan be able to assert that it will become actuarially insolvent but for the application of a particular rule to a particular participant or group of participants.

B. The Conflict Between the Rulings of the District of Columbia and Ninth Circuits with Respect to the Plan's Anti-Dumping Rules Has Made It Impossible for the Shopmen Trustees to Apply Important Plan Provisions in a Consistent Manner Throughout the United States

ERISA imposes a fiduciary obligation upon employee benefit plan trustees to administer their plans in accordance with the terms of the plans' governing instrument(s). ERISA Section 404(a)(1)(D), 29 U.S.C. § 404(a)(1)(D). Inherent in that obligation is a requirement that a plan's rules and regulations be applied in a consistent and nondiscriminatory manner. *Id.* Indeed, consistency of implementation is especially important when a plan is a national one. But consistency of implementation of the Shopmen Plan's actuarially important anti-dumping rules no longer is possible. The Ninth Circuit's wholesale rejection of *Stewart II* effectively means that the Shopmen Trustees may hereafter only protect the fund from liability dumping by withdrawing employers located east of the Colorado River.

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[33] See n.19, *supra*.

The Trustees are faced with a dilemma that only this Court can resolve. The necessity of resolving the split among the circuits as to the implementation of the Shopmen Plan's specific anti-dumping rules is by itself sufficient reason to warrant the granting of *certiorari.*

One further point in this regard remains to be made. Petitioner fully expects the Respondents herein to contend that, despite the conflict among the circuits, the granting of *certiorari* in this matter is unnecessary because of the enactment of the 1980 Multiemployer Pension Plan Amendments to ERISA.[34] These Amendments obligate employers who withdraw from multiemployer plans to pay to those plans an amount equal to the unfunded liabilities attributable to their work force. If withdrawal liability is not paid voluntarily, plans are authorized to file suit in the federal courts. The 1980 Act, Respondents asserted below, has made it unlikely that the Shopmen Fund will ever again need to implement its anti-dumping provisions to protect itself from withdrawing employers. The appellate court adopted their position. It is, however, dead wrong.

The mere availability of an action under MPPA is not a guarantee that any withdrawal liability ever will be collected. Indeed, it is the experience of the Shopmen Plan that most employers withdraw because they have ceased to be economically viable. This is not surprising since the American structural steel industry has suffered a serious economic downturn during the past decade. Frequently, withdrawn employers have no assets from which to pay withdrawal liability and have filed for or been forced into bankruptcy. Withdrawal liability claims have no preferential status in bankruptcy and seldom are collected. See *Trustees of Amalgamated Insurance Fund v. McFarlin's, Inc.*, 789 F.2d 98 (2d Cir. 1986), and cases cited therein. See also *In re United Department Stores,*

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[34] 29 U.S.C. §§ 1381-1405.

Inc., 12 Collier, Bankruptcy Cases 1424, 6 E.B.C. 2293 (S.D. N.Y. 1985) and cases cited therein.

Since the disposition of the Shopmen Fund's petition for rehearing in this matter, another large employer, from whom withdrawal liability might well prove uncollectible, has withdrawn from the Fund. The withdrawal liability involved in that matter is in the millions of dollars. And the NSPF cannot be sanguine about the status of other participating employers. The need for protective provisions like Sections 2.09 and 2.10 remains as strong as before the MPPA's enactment. Indeed, this fact was recognized explicitly by the District of Columbia Circuit in *Stewart I*, *supra*, at 730 F.2d 1565, n.31.

II. UNLESS REVERSED BY THIS COURT, THE STANDARD OF REVIEW ESTABLISHED BY THE NINTH CIRCUIT'S DECISION INEVITABLY WILL LEAD TO HIGHLY ARBITRARY AND VERY UNFAIR RESULTS, BOTH FOR SHOPMEN PLAN PARTICIPANTS AND FOR MULTIEMPLOYER PENSION PLAN PARTICIPANTS THROUGHOUT THE UNITED STATES

Provisions such as Sections 2.09 and 2.10 of the Shopmen Plan are prophylactic in nature. Their purpose is to remedy the effects of each instance of liability dumping and thereby prevent a plan from ever reaching the point of financial crisis. In a large multiemployer plan such as the Shopmen Fund, it is not likely that any single employer withdrawal (or other liability dumping) will result in the Fund becoming actuarially insolvent. But the unremedied cumulative effects of several withdrawals and the unfunded liabilities thus dumped on the Fund might well have that result. The Ninth Circuit's requirement that trustees wait until a fiscal catastrophe has actually occurred before they may take remedial steps simply defies common sense. It is equivalent to prohibiting a physician from treating a hemorrhaging patient until after the patient has died from loss of blood.

The Ninth Circuit's rule also leads to some highly arbitrary and unfair results. If trustees are required to delay using a protective provision such as Section 2.10 until the liability dumping resulting from a particular withdrawal (or other employer action) would push a plan over the brink into actuarial insolvency, only the work force of the employer whose liability dumping had "broken the camel's back" would be subject to benefit reductions while the employees of previously withdrawn employers (whose withdrawal equally contributed to the ultimate financial crisis) would be entirely unaffected. A policy or rule whose effects on participants is determined entirely by chance (i.e., the relative order in which their employers withdraw or otherwise dump unfunded liability) could hardly be more arbitrary.[35]

Once a plan fails, all participants lose. Employees no longer accrue benefits. And the Pension Benefit Guaranty Corp. does not necessarily insure all benefits that would be paid by an ongoing plan. See generally Title IV, Subtitle B of ERISA, 29 U.S.C. §§ 1321-1323.

There is yet another anomalous aspect of the appellate court's decision that requires discussion. Because its rationale is equally applicable to other plan rules that might result in the curtailment of a participant's benefits, many fundamental plan rules, even though specifically sanctioned by ERISA and the regulatory agencies, have effectively been nullified.

Section 2.10 is no different in principle from other types of benefit eligibility rules. Rules such as those pertaining to vesting, breaks in service, and suspensions of benefits are equally fundamental to both a plan's design and the actuarial assumptions on which its funding program is founded. It is, therefore, only a natural extension of the Ninth Circuit's ruling to view it as simi-

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[35] The Trustees, it must be noted, owe a fiduciary duty to all plan participants, not just to those of one employer group. *Stewart v. National Shopmen Pension Fund, supra,* at 730 F.2d 1563.

larly prohibiting these other types of entitlement rules to be implemented whenever they may cause a participant to lose benefits unless the failure to implement a specific rule in a specific instance would itself cause the plan to become "financially unstable."

One can easily see the principles espoused by the lower court setting off an avalanche of litigation. Now, virtually any application of a lawful plan rule that reduces or denies benefits is susceptible to challenge on the ground that payment of the disputed benefit would not cause the plan to become "financially unstable." Clearly, a principle of law that leads to such a pervasive result cannot have been intended by Congress and merits review by this Court.

Finally, the Court should recognize and be concerned about the devastating consequences the lower court's decision will have for older workers. The opinion will jeopardize the ability of hundreds of thousands of such workers to obtain meaningful pension benefits. If plan sponsors and trustees cannot effectively grant past service and other forms of retroactive benefits conditionally, as they have in the past, it would be foolish for them to continue the practice at all. The personal fiduciary risk they would be required to take would be far too great.[36] Such a result would be a tragic injustice to the hundreds of thousands of multiemployer plan participants whose employers faithfully meet their obligations to their respective funds.[37]

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[36] See pp. 9-10, *supra*.

[37] It is important to note that most withdrawals from the NSPF do not result in liability dumping or consequent benefit reductions. While Petitioner has no figures for the industry as a whole, it suspects that this experience is a common one.

CONCLUSION

For the reasons set forth herein, Petitioners respectfully request that a writ of certiorari be issued to the court below.

Respectfully submitted,

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February 16, 1990

APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-3724

D.C. No. C-83-1484-RC

REUBEN MCDANIEL; JOE P. MARTIN;
EILEEN HERRALA; JOSEPH GUENTHER; HENRY MOSER,
Plaintiffs-Appellees,

v.

THE NATIONAL SHOPMEN PENSION FUND,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted
June 7, 1989—Seattle, Washington

Filed July 20, 1989
Amended November 17, 1989

ORDER AND AMENDED OPINION

Before: Alfred T. Goodwin, Chief Judge, Eugene A. Wright and William A. Norris, Circuit Judges

Per Curiam

Thomas J. Hart and Lena S. Zezulin, Thomas Hart & Associates, Washington, D.C., Richard H. Robblee, Hafer,

Price, Rinehart & Schwerin, Seattle, Washington, for the defendant-appellant.

Neal S. Dudovitz and Gill Deford, National Senior Citizens Law Center, Los Angeles, California, Alfred H. Sigman and Jeffrey Lewis, Sigman & Lewis, Oakland, California, John E. Iverson and Thao Tiedt, Ryan, Swanson, Hendel & Cleveland, Seattle, Washington, for the plaintiffs-appellees.

ORDER

The opinion filed in this case on July 20, 1989, is amended as follows:

At slip opinion page 7855, delete the first eight lines of the second paragraph and replace them with the following:

> In *Elser*, we held that a multiemployer pension fund could not cancel pension credits to cover an unfunded liability. *Id.* at 657. Although the fund in *Elser* argued that the pension forfeiture provision was necessary to protect the actuarial soundness of the plan, the fund offered no evidence of financial instability. *Id.*[2] Generally, a multiemployer fund seeking to apply its pension forfeiture provisions must demonstrate that the overall financial stability of the plan is endangered. *See Burditt v. Western Growers Pension Plan*, 818 F.2d 698 (9th Cir. 1987), *aff'g*, 636 F.Supp. 1491, 1497 (fund's application of pension forfeiture provision is arbitrary and capricious unless "overall financial stability of

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[2] We recognize that our circuit is in apparent conflict with the D.C. Circuit, which has held that a fund may reduce benefits to recoup unfunded liabilities, regardless of any threat to the overall financial stability of the fund. *See Stewart v. National Shopmen Pension Fund*, 795 F.2d 1079, 1083 (D.C. Cir. 1986); *Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552, 1566 (D.C. Cir.), *cert. denied*, 469 U.S. 834 (1984).

the pension plan is endangered"). Here, as in *Elser*, the Fund has failed to carry that burden.

OPINION

PER CURIAM:

Beginning in 1971, Fentron Industries ("Fentron") made contributions on behalf of its employees to the National Shopmen Pension Fund ("the Fund"), a multiemployer pension plan,[1] until it withdrew from the Fund in 1978. In 1982, the Fund's trustees voted to cancel certain pension credits previously earned by the Fentron employees, justifying the action on the ground that Fentron's departure left the Fund with $500,000 in unfunded liabilities. The Fentron employees brought this suit to set aside the Fund's action. The district court granted summary judgment to the employees, holding that the Fund's cancellation of pension credits was arbitrary and capricious in violation of section 302(c) of the Taft-Hartley Act, 29 U.S.C. § 186(c)(5), and section 404 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1104. We affirm because we believe this case is controlled by our decision in *Elser v. I.A.M. Nat'l Pension Fund*, 684 F.2d 648 (9th Cir. 1982).

In *Elser*, we held that a multiemployer pension fund could not cancel pension credits to cover an unfunded liability. *Id.* at 657. Although the fund in *Elser* argued that the pension forfeiture provision was necessary to protect the actuarial soundness of the plan, the fund offered no evidence of financial instability. *Id.*[2] Gen-

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[1] The facts of this case are fully set forth in our earlier decision in *McDaniel v. National Shopmen Pension Fund*, 817 F.2d 1370 (9th Cir. 1987), in which we held that the Trust Agreement authorized the trustees to reduce the benefits in question and remanded for a determination whether the reduction was nonetheless prohibited by ERISA.

[2] We recognize that our circuit is in apparent conflict with the D.C. Circuit, which has held that a fund may reduce benefits to

erally, a multiemployer fund seeking to apply its pension forfeiture provisions must demonstrate that the overall financial stability of the plan is endangered. *See Burditt v. Western Growers Pension Plan*, 818 F.2d 698 (9th Cir. 1987), *aff'g*, 636 F. Supp. 1491, 1497 (fund's application of pension forfeiture provision is arbitrary and capricious unless "overall financial stability of the pension plan is endangered"). Here, as in *Elser*, the Fund has failed to carry that burden. We agree with the district court that the record contains no evidence that unfunded obligations to Fentron's employees threatened the financial integrity of the Fund. Nor is there any evidence to support the Fund's argument that the reduction is needed to deter other employers from dumping unfunded liabilities on the Fund in the future. Indeed, since 1981, under section 104 of the Multiemployer Pension Plan Amendments Act. Pub. L. No. 96-364, 94 Stat. 1208, codified at 29 U.S.C. § 1381, employers who withdraw from multiemployer funds have been required to fund their proportionate share of the plan's unfunded benefit obligations. *See Board of Trustees v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1402 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985). By requiring employers to make up any shortfall in contributions when they withdraw from a pension fund, the 1981 legislation protects funds from having unfunded liabilities dumped upon them by departing employers. Given the 1981 change in the law, the Fund has failed to persuade us that cancellation of pension credits earned by Fentron employees was necessary to deter other employers from withdrawing from the Fund and saddling it with unfunded liabilities.

The judgment is AFFIRMED.

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recoup unfunded liabilities, regardless of any threat to the overall financial stability of the fund. *See Stewart v. National Shopmen Pension Fund*, 795 F.2d 1079, 1083 (D.C. Cir. 1986); *Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552, 1566 (D.C. Cir.), *cert. denied*, 469 U.S. 834 (1984).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-3724

REUBEN MCDANIEL, *et al.*,
Plaintiffs-Appellees,
v.

THE NATIONAL SHOPMEN PENSION FUND, *et al.*,
Defendants-Appellants.

ORDER

[Filed Nov. 20, 1989]

Before: GOODWIN, WRIGHT, and NORRIS, Circuit Judges:

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judges Goodwin and Norris vote to reject the suggestion for a rehearing en banc, and Judge Wright so recommends.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. p. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C83-1484C

REUBEN MCDANIEL, *et al.*,
Plaintiffs,

vs.

THE NATIONAL SHOPMEN PENSION FUND, *et al.*,
Defendants.

ORDER ON MOTIONS
FOR SUMMARY JUDGMENT

[Filed Sep. 6, 1985]

THIS MATTER comes before the Court on the parties' cross-motions for summary judgment. Upon due consideration of the pleadings, affidavits, exhibits, and oral argument, and the Court being fully advised, plaintiffs' motion for partial summary judgment is hereby GRANTED, defendant National Shopmen Pension Fund's (the "Fund's") motion for summary judgment is GRANTED IN PART AND DENIED IN PART, defendant Fund's motion to strike is STRICKEN AS MOOT, and the trustee defendants' motion for summary judgment is GRANTED.

FACTS:

This action is brought by a class of approximately 90 present and former workers at Fentron, Inc., or beneficiaries of such employees, whose pension benefits were reduced by action of the pension fund trustees, following the withdrawal by Fentron from participation in the

Fund. Originally, Fentron's withdrawal arose in the context of a labor dispute between Fentron and Shopmen's Local Union No. 506, which represented plaintiffs.

Initially, the trustees of the Fund sought to cut back the amount to be paid to plaintiffs by eliminating the "past service credits" provided for in Section 2.09 of the pension plan documents ("Plan"). However, this Court, Judge Walter T. McGovern, presiding, ruled that the invocation of Section 2.09 to reduce plaintiffs' vested benefits violated ERISA § 203(c)(1)(B), 29 U.S.C. § 1053 (c)(1)(B). *Fentron Industries v. National Shopmen's Pension Fund*, 2 E.B.C. 1121 (W.D. Wa. 1981). In 1982, the Ninth Circuit Court of Appeals affirmed that decision. *Fentron Industries v. National Shopmen Pension Fund*, 674 F.2d 1300 (9th Cir. 1982).

In a second attempt to reduce plaintiffs' benefits, the trustees next applied Section 2.10 of the Plan, and notified plaintiffs of the corresponding reduction of benefits in May of 1982. Section 2.10 provides:

> "The Trustees reserve the right to reduce the portion of the pension which is attributable to any increase in the contribution rate which increase was agreed upon subsequent to the original Collective Bargaining Agreement providing for contributions to the Fund in order to preserve an actuarially sound relationship between the contributions anticipated from the particular Employer as a result of the said increased contribution rate and the projected benefits to be paid to Participants of the Employer as a result thereof."

This suit resulted, seeking an injunction against the reduction in benefits and restoration of full benefits to all class members, retroactive to the date on which benefits were reduced, with full legal interest. Plaintiffs also seek an injunction against further efforts to reduce their benefits, punitive damages, attorneys' fees and costs.

DISCUSSION:

Despite more than 250 pages of briefing to the Court, this Court's ruling in plaintiffs' favor stems from a single legal conclusion—the reduction of plan benefits implemented by the trustees was not authorized by Section 2.10 of the Plan. Thus, it is immaterial whether ERISA would allow the reduction of benefits "which are carried out under authority reserved by the pension plan", *Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552, 1565 (D.C. Cir. 1984). Because the action taken by the trustees was without authority under the stated provision of the Plan, the reduction of benefits must be ordered reversed. *Elser v. I.A.M. National Pension Fund*, 684 F.2d 648 (9th Cir. 1982).

Section 2.10 reserves for the trustees an important, but narrow, authority which is best understood in the context of this Plan's design. Pursuant to the Plan, pension benefit levels to be paid to employees are directly correlated to the rate of contribution ("contribution rate") paid in by employers. *See* Plan, Article III. Contribution rates are negotiated between the union and the contributing employer; however, whether a participant has been covered under more than one contribution rate, his or her benefit level will be determined, generally, on the basis of the highest contribution rate under which he or she worked. *Id.* As a result of this arrangement, a financial and actuarial anomaly may arise. When an employer has contributed for an extended period of time at a certain rate, the Fund will have accumulated a fund actuarially expected to be sufficient to pay out pension benefits at the level correlated to the ongoing contribution rate. However, if the employer and union then negotiate a higher contribution rate, the Fund will then be funded only with an accrued amount actuarially sufficient to pay at the earlier benefit level, but the Fund may nevertheless become obligated to pay out pension benefits at the level correlated to the new, and higher, contribution rate.

Thus, the Fund would face an actuarial imbalance between the amount of funds accrued with respect to that employer's pensioners and the actuarially expected future benefit obligations. Although such circumstances are not the only possible cause of an actuarial imbalance, the drafters of the plan recognized the inherent risk associated with this particular cause.

Section 2.10, entitled "Contribution Rate Increases," was therefore included in the Plan to address exactly this kind of actuarial imbalance. In the event of an actuarial imbalance arising from an increase in the contribution rate of an ongoing plan, the trustees may elect to reduce the portion of the Fund's pension obligation which attached with regard to the increased contribution rate. However, nothing in the terms of Section 2.10 or in the Plan considered as a whole suggests that Section 2.10 was intended to address all actuarial imbalances from whatever cause, and it is undisputed that, until the application of Section 2.10 in the instant case, Section 2.10 has only been applied during the negotiations of increased contribution rates. *See* Deposition of Thomas Levy, January 24, 1985, pp. 114-116.

The application by the trustees of Section 2.10 in the instant matter arose from circumstances entirely unrelated to an increase in contribution rates, but rather from the actuarial imbalance created by the termination of Fentron's participation in the Plan. Specifically, by virtue of Fentron's withdrawal from the Plan, its contributions to the Fund stopped, yet the Fund's obligation to pay out pension benefits to vested Fentron pensioners remained. Thus, because the Fund's actuarial calculations had anticipated an ongoing stream of contributions to accrue sufficient funds to pay the vested pension benefits, the withdrawal of Fentron from the Fund created an immediate and financially substantial imbalance with regard to vested Fentron pensioners.

However, although the Court acknowledges the existence of an actuarial imbalance due to Fentron's withdrawal, the mere existence of an actuarial imbalance cannot justify a reduction of pension benefits pursuant to Section 2.10, unless that imbalance arose in the negotiation of increased contribution rates. Accordingly, the trustees' action may not be sustained because it was without support from the terms of the Plan, *Blau v. Del Monte Corporation*, 748 F.2d 1348, 1354 (9th Cir. 1984) ("[I]mposition of a standard that is not contained in the terms of a plan amounts to an arbitrary and capricious decision"), and was thus in violation of ERISA § 404, 29 U.S.C. § 1104.

Defendants' argument that Section 2.10 was intended to address any actuarial imbalance, or any actuarial imbalance arising subsequent to an earlier, unrelated, contribution rate increase, is belied not only by the title of that provision and its terms, but upon a consideration of the Plan as a whole. *See supra.* It is important to note, however, that the Court is not concluding that a provision allowing a reduction of benefits due to employer withdrawal could not have been included in the Plan and supported under ERISA, *see Stewart supra*; *see also Elser, supra*; *Central Tool Co. v. International Association of Machinists National Pension Fund*, 523 F. Supp. 812 (D.D.C. 1981), but only that this Plan did not include such a provision. Especially in light of ERISA's policy "to safeguard the well-being and security of working men and women and to apprise them of their rights and obligations under any employee benefit plan", *Blau, supra* at 1356, quoting *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982), the absence of any support for the proposed expansive interpretation of Section 2.10 commands the interpretation taken by the Court today.

Additionally, the Court notes that even if defendants' interpretation of Section 2.10 were to be accepted by the

Court, the reduction of plaintiffs' benefits, given the facts of this particular case, may also have been an unlawful violation of ERISA § 204(g). *Cf. Fentron, supra*, 674 F.2d at 1306 (decision to use Section 2.09 was an amendment of the vesting schedule in violation of ERISA § 203(c)(1)(B)).

Thus, because the Fund's reduction of benefits was arbitrary, being without authority pursuant to the Plan documents, plaintiffs' motion for partial summary judgment must be GRANTED, and, except as discussed *infra*, the Fund's motion for summary judgment is DENIED.

The remaining issues for this Court to determine are whether the Fund's trustees may be individually liable and whether they, or the Fund, may be liable to plaintiffs for punitive damages.

As a preliminary matter, the Court adopts the view of the D.C. Circuit that "avoiding the dumping of unfunded liability is a permissible goal of multiemployer pension funds . . . . [I]t is presumptively reasonable," *Stewart, supra* at 1566, and that avoiding unfunded liability is no less serious a task for trustees where only one employer is concerned, because an accumulation of unfunded liability may pose substantial risks to the security of the Fund, which must be avoided at its source. *Central Tool, supra.* Additionally, the Court notes that *per se* liability may not be imposed upon the trustees in this action. Rather, "a trustee may be found to have violated his fiduciary duty only when his or her action was 'made in bad faith, or upon lack of a factual foundation, or when unsupported by substantial evidence.'" *Fentron, supra*, 674 F.2d at 1307.

In the present case, it is undisputed that the Fund undertook an actuarial study concerning Fentron's withdrawal, which revealed a substantial unfunded liability. Thus, in light of the above rulings, the Court concludes

as a matter of law that the trustees' action was supported by substantial evidence, upon an adequate factual foundation.

Moreover, plaintiffs have failed to show any facts which support their contention that the trustees' action herein was taken in bad faith. While plaintiffs allege a retaliatory motive related to Fentron's dispute with Local 506, they have offered only the conclusory allegations of Fentron's President, John Sennstrom. These allegations must be contrasted with the essential responsibility of the trustees to avoid unfunded liability:

> "When a fund is obligated to pay out more money than has been paid in, and it is unable to recoup the difference, '[t]hese excess benefits would have to come largely from the stepped-up contributions of current participants.'" *Stewart, supra*, citing *Harm v. Bay Area Pipe Traders Pension Plan Trust Fund*, 701 F.2d 1301 (9th Cir. 1983).

Finally, plaintiffs' allegations are belied by the fact that the trustees are hardly mere agents of the Union with which Fentron was in dispute; rather, the trustees are an equally divided panel of representatives from the Union's and the employer's national associations. Accordingly, the presence of an equal number of representatives on the panel suggests plaintiffs' allegations to be even more unlikely. Thus, there being no issues of material fact with regard to a proper foundation for the trustees' decision to reduce benefits based upon Section 2.10, nor with regard to the good faith justification for that decision, the trustees' motion for summary judgment must be GRANTED.

Lastly, the question of punitive damages, whether owing from the Fund or the trustees, has recently become a rather simple determination for the Court. On June 17, 1985, the Supreme Court decided this same question in *Massachusetts Mutual Life Insurance Co. v.*

Russell, No. 84-9, holding that extra-contractual compensatory or punitive damages are not allowed under ERISA. Accordingly, with regard to that issue only, the Fund's motion for summary judgment is GRANTED.

In summary, the ruling of the Court is as follows:

1. Plaintiffs' motion for partial summary judgment is GRANTED;

2. Defendant National Shopmen Pension Fund's motion is GRANTED only with respect to the issue of punitive damages, and is DENIED in all other respects;

3. Defendant Fund's motion to strike is STRICKEN AS MOOT; and

4. The trustee defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that:

(a) The defendants are permanently enjoined from reducing, pursuant to Section 2.10 of the Plan, plaintiffs' pension benefits;

(b) The Fund shall forthwith restore to plaintiffs full benefits, retroactive to the date on which benefits were reduced, with full legal interest; and

(c) Pursuant to ERISA § 502(g). 29 U.S.C. § 1132 (g), the Fund shall pay plaintiffs' reasonable attorneys' fees and costs, subject to Court approval.

The parties are directed to submit an agreed form of judgment in accordance with this ruling.

DATED this 6th day of September, 1985.

/s/ John C. Coughenour
JOHN C. COUGHENOUR
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-4207

D.C. No. CV83-1484C

REUBEN MCDANIEL, JOE P. MARTIN, EILEEN HERRALA, JOSEPH GUENTHER, HENRY MOSER,
Plaintiffs-Appellees,

v.

THE NATIONAL SHOPMEN PENSION FUND, A.S. GOODWIN, SAMUEL SPADEA, DENNIS R. TOONEY, RICHARD SMITH, W.J. MUSE, JOHN DOE,
Defendants-Appellants.

Argued and Submitted
February 3, 1987—Seattle, Washington

Filed May 21, 1987

Before: J. Clifford Wallace, Betty B. Fletcher and Melvin Brunetti, Circuit Judges

Opinion by Judge Wallace

Appeal from the United States District Court
for the Western District of Washington
Donald S. Voorhees, District Judge, Presiding

Gill Deford, Los Angeles, California, for the plaintiffs-appellees.

Thomas J. Hart, Washington, D.C., for the defendants-appellants.

OPINION

WALLACE, Circuit Judge:

The National Shopmen Pension Fund (the Fund) and its trustees appeal the district court's order granting summary judgment in favor of McDaniel and a class of beneficiaries of the Fund (McDaniel). The district court, which had jurisdiction pursuant to 29 U.S.C. § 1131 (e)(1), held that the Fund's trustees unreasonably interpreted a provision of the National Shopmen Pension Fund Plan (the Plan) to permit the trustees to reduce McDaniel's benefits. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse.

I

In 1971, Fentron Industries, Inc. (Fentron) began to make contributions to the Fund, in accordance with the Plan, for the benefit of Fentron's employees. Under the Plan, a retiring or disabled employee receives a pension calculated on the basis of two variables: (1) the contribution rate of the employer, and (2) the number of years of employment credited to the employee. The contribution rate multiplied by the number of years of employment multiplied by a constant yields the amount of the employee's monthly pension. Initially, Fentron contributed $0.20 per hour of employee time. Fentron increased its contribution rate to $0.25 per hour in 1974 and then to $0.35 per hour in 1975.

In 1977, Fentron ceased contributing to the Fund. The Fund's trustees determined that Fentron's withdrawal from participation caused the Fund to be responsible for roughly $500,000 in unfunded liabilities. These

liabilities resulted from the Fund's practice of granting two forms of retroactive benefits. First, the Fund gave "past service credit": credit for an employee's years of service with his employer before the employer began contributing to the Fund. Second, when Fentron increased its contribution rate, the Fund granted pension benefits based upon the higher rate even though that rate was not in effect for all the years of an employee's service. In the first case, benefits were granted for periods of employment during which no contributions were made. In the second, greater benefit levels were applied to periods during which lesser benefits were actually earned because the employer's contributions were at a lower rate.

Although these retroactive benefits resulted initially in unfunded liabilities, the liabilities ordinarily would have been eliminated over time. The Fund's actuaries calculate the ratios of benefit levels to contribution rates so that any unfunded liabilities are amortized over a 30 to 40 year period of employer contribution. If, however, the employer reduces his participation or withdraws from the Fund before the amortization is completed, an actuarial imbalance arises, leaving the Fund responsible for unfunded liabilities. Fentron's withdrawal created such an imbalance.

To avoid leaving the Fund responsible for unfunded liabilities arising from retroactive pension benefits, the Plan contains two provisions which make the grant of such benefits conditional by reserving to the trustees the power to reduce or eliminate them. The first provision, section 2.09 of the Plan, gives the trustees the power to cancel benefits resulting from the granting of past service credit. Thus, when Fentron withdrew in 1978, the Fund's trustees applied section 2.09 and canceled past service credits of Fentron employees. Fentron and a class of its employees filed suit in 1979 alleging that this action violated the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1381. We heard an

appeal from that action in 1982 and held that although section 2.09 was valid on its face, it could not be applied to divest completely employees who had previously been vested. *Fentron Industries, Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1306 (9th Cir. 1982) (*Fentron I*). *Cf. Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552, 1556-61 (D.C. Cir.) (interpreting our decision as being limited to a case where complete divestment occurred and holding that section 2.09 could lawfully be used to reduce the benefits resulting from past service credits), *cert. denied*, 469 U.S. 834 (1984).

While the appeal in *Fentron I* was pending, the trustees voted to apply the second provision, section 2.10, in the event that we determined that they could not apply section 2.09 in this situation. The trustees did not apply this provision as they had section 2.09 to reduce benefits resulting from past service credits. Rather, they applied section 2.10 to reduce retroactive benefits granted when Fentron increased its contribution rate. Section 2.10 reads as follows:

> Section 2.10. Contribution Rate Increases. The Trustees reserve the right to reduce the portion of the pension which is attributable to any increase in the contribution rate which increase was agreed upon subsequent to the original Collective Bargaining Agreement providing for contributions to the Fund in order to preserve an actuarially sound relationship between the contributions anticipated from the particular Employer as a result of said increased contribution rate and the projected benefits to be paid to Participants of the Employer as a result thereof.

McDaniel filed a second suit against the Fund and its trustees alleging that the trustees' use of section 2.10 violated ERISA. On cross-motions for summary judgment, the district court entered judgment in favor of the trustees in their personal capacities. The court, however,

concluded that section 2.10 did not authorize the trustees to lower benefit levels in these circumstances. Therefore, the court held that using section 2.10 in this manner violated ERISA § 404, 29 U.S.C. § 1104, and granted partial summary judgment against the Fund. As it was unnecessary for the court to address McDaniel's contentions that section 2.10 also violated ERISA in other respects, a final judgment was entered. We review de novo a district court's entry of summary judgment. *Lojek v. Thomas*, 716 F.2d 675, 677 (9th Cir. 1983).

II

ERISA requires a plan administrator to "discharge his duties . . . in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104 (a)(1)(D). We will reverse this decision of the administrator of the ERISA plan only if the decision is arbitrary, capricious, or made in bad faith. *Dockray v. Phelps Dodge Corp.*, 801 F.2d 1149, 1152 (9th Cir. 1986). A decision is not arbitrary or capricious if it is based on a reasonable interpretation of the plan's terms and was made in good faith. *Id.* Because the district court found that there was no showing that the trustees acted in bad faith, we need only consider the reasonableness of the trustees' interpretation. Absent special circumstances, we should defer to an administrator's reasonable resolution of any ambiguities in the plan's language. *Id.* Therefore, the direct question we face is not whether we believe section 2.10 applies in these circumstances, but instead whether the trustees have adopted a reasonable interpretation of that provision.

A.

We begin our analysis of section 2.10 with its plain language because the best indication of what words mean is what they say. McDaniel contends that reading the provision for its ordinary meaning shows that it comes

into play only when an actuarial imbalance is "caused" by an increased contribution rate. McDaniel points to certain phrases in section 2.10 which ostensibly demonstrate that a "casual link" is required. The trustees have the power to reduce benefits "*attributable to* any increase in the contribution rate" to preserve an actuarial balance between the employer's anticipated contributions "*as a result of* the said increased contribution rate," and the benefits to be paid "*as a result thereof.*" Plan § 2.10 (emphasis added). McDaniel concludes that when an employer increases its contribution rate, the trustees, at that time and at that time only, can apply section 2.10 to reduce benefit levels to assure an actuarial balance. Because of this causation requirement, McDaniel contends, section 2.10 cannot be applied in any other circumstance. Specifically, McDaniel argues that the trustees cannot use the provision to resolve actuarial imbalances "caused" by an employer's subsequent withdrawal from the Plan.

McDaniel's reading of section 2.10 is logical and highly persuasive. The issue, however, is not whether this reading is the most plausible, but whether the trustees' interpretation is unreasonable.

The trustees also recognize that section 2.10's language requires a causal connection between a contribution rate increase and an actuarial imbalance. But the trustees interpret the provisions as requiring a different sort of causal connection. They emphasize the portion of the language in section 2.10 which gives the trustees the power to reduce retroactive benefits "attributable to any increase in the contribution rate." *Id.* From this language they conclude that a causal connection exists if the increased contribution rate is a "but for" cause or cause-in-fact of the imbalance. As the trustees interpret the provision, the required causal link is present in this case. The actuarial imbalance would not have occurred but for the benefits granted retroactively when Fentron increased its contribution rate.

The trustees thus agree with McDaniel that section 2.10 is not a "catch-all" provision permitting the trustees to solve any and all actuarial imbalances by reducing benefits. The provision can only be used to reduce benefits granted retroactively as a result of a contribution rate increase. The trustees disagree, however, that section 2.10 requires action immediately upon payment increase. Indeed, in one respect, the language of section 2.10 can be reasonably interpreted as having an open-ended aspect. It allows benefit reductions "in order to preserve" an actuarial balance.

The plain language, therefore, does not indicate whether section 2.10 is triggered only when some stronger form of causal link, such as "proximate" causation, exists between a contribution rate increase and an actuarial imbalance. In this regard, the provisions is ambiguous and we must resolve the ambiguity in favor of the trustees' interpretation if it is reasonable. Section 2.10 can reasonably be interpreted to permit the trustees to adjust benefits whenever a later event, such as an employer's withdrawal, undermines the funding for benefits that were granted retroactively as a result of a contribution rate increase. We conclude, therefore, that the plain language of the provision is ambiguous and that the trustees have chosen one reasonable way to interpret that ambiguity.

B.

McDaniel argues, however, that the trustees' interpretation of the ambiguity is precluded if we examine section 2.10 in the context of the Plan as a whole. McDaniel points out that section 2.09 gives the trustees the power to take action "if an Employer's participation in the Fund . . . terminates." Specifically, the trustees have the power to reduce benefits resulting from the practice of giving credit for past service. McDaniel argues that the structure of the Plan as a whole shows

that section 2.09, not section 2.10, grants the trustees the power to respond to an employer's withdrawal.

This view is strengthened, McDaniel claims, if one examines the 1969 version of the Plan. What is now section 2.10 was, in 1969, contained in article II section 7 of the Plan. (We will refer to this provision as "old section 2.10.") Furthermore, a provision corresponding to section 2.09 was found in article II section 6 ("old section 2.09"). The language in new section 2.10 is identical in all material respects to the language in old section 2.10. New section 2.09, however, is not identical to old section 2.09. The old provision gave the trustees the power, in the event of an employer's withdrawal, to cure an actuarial imbalance by reducing benefits without regard to the origin of the benefits. Given the broad reach of old section 2.09, it seems reasonable to infer, as McDaniel does, that old section 2.10 was intended to deal only with the immediate consequences of a contribution rate increase, and not with actuarial imbalances occasioned by subsequent employer withdrawals. McDaniel concludes that because the language of new section 2.10 tracks the language of the old section, the new section must have the same meaning as the old and therefore likewise does not extend to employer withdrawals.

McDaniel's explanation of the structure and history of the Plan is plausible. Of necessity, however, it would leave a gap in the current version of the Plan. Although old section 2.09 gave the trustees the power to reduce all benefits to correct an imbalance resulting from an employer's withdrawal, new section 2.09 is not as broad. The new version only grants the power to reduce benefits arising from past service credits. Under McDaniel's interpretation, the trustees would not have a mechanism for reducing retroactive benefits attributable to contribution rate increases when an employer's subsection withdrawal leaves liabilities unfunded.

The trustees, on the other hand, argue that the language of new section 2.10 provides them with just such a mechanism. Since the language of new section 2.10 and old section 2.10 is the same, the trustees' contention here logically must mean that they enjoyed similar powers under old section 2.10. Under this interpretation, however, the 1969 version of the Plan would contain a redundancy because it would have given the trustees power to correct imbalances attributable to contribution rate increases under both old section 2.09 and old section 2.10.

The trustees, in interpreting the present version of section 2.10, are thus confronted with the choice of interpreting it so that the 1969 version of the Plan contained a redundancy or so that the present version of the Plan contains a gap. It is at least as inherently reasonable for the trustees now to conclude that there was a redundancy in the old Plan as to conclude that there is a gap in the new one. We cannot say, therefore, that the trustees' interpretation of section 2.10 is not reasonable, even when examined in the context of the old Plan and the Plan's subsequent history.

C.

McDaniel makes other arguments that deserve only brief attention. He points out that a paragraph in the summary plan description from the 1969 version of the Plan indicates that benefits may be reduced when contribution rates are increased and when new employers join the Fund. This paragraph, however, does not purport to limit the scope of section 2.10.

McDaniel also points out that, before this case, the trustees had never applied section 2.10 in response to an employer's withdrawal. This fact, however, does not mean that the trustees lacked the power to apply section 2.10 in this manner.

III

We have scrutinized the plain language of section 2.10, reviewed its history, and examined it in the context of the Plan as a whole. We hold that it was not unreasonable for the trustees to interpret section 2.10 as permitting them to reduce benefits attributable to contribution rate increases in order to cure an acturial imbalance after an employer withdraws from participation in the Fund. We have not considered, and do not decide, whether the trustees' application of section 2.10 violated ERISA in other respects. Therefore, we remand for further proceedings.

REVERSED AND REMANDED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C83-1484C

REUBEN MCDANIEL, *et al.*,
Plaintiffs,

vs.

THE NATIONAL SHOPMAN PENSION FUND, *et al.*,
Defendants.

ORDER ON PLAINTIFFS' RENEWED MOTION FOR SUMMARY JUDGMENT

[Filed Feb. 29, 1988]

THIS MATTER is before the Court on the plaintiffs' renewed motion for summary judgment. This action concerns the limits on the right of the defendant pension trust fund ("Fund" or "trustees") to alter vested pension benefits of present and former employees of Fentron, Inc. ("Fentron") When Fentron withdrew from the Fund in 1977, the trustees first attempted to reduce vested benefits using section 2.09 of the pension plan which permits elimination of "past service credits." The Ninth Circuit held that application of that provision to deprive the plaintiffs of their vested rights violated 29 U.S.C. 1053(c)(1)(B). *Fentron Industries, Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1306 (9th Cir. 1982).

Shortly after the Circuit issued its ruling, the trustees employed another plan provision, section 2.10, to reduce the benefits expected by vested persons. This Court held that the trustees' interpretation of section 2.10 violated

29 U.S.C. § 1104(a)(1)(D) and that, in accordance with prior use of the section, the trustees could only use it during negotiations for increased employer contribution rates. The Ninth Circuit reversed, stating that section 2.10 is ambiguous and that the courts must defer to the trustees' reasonable interpretation of the section. *McDaniel v. National Shopmen Pension Fund*, 817 F.2d 1370, 1375 (9th Cir. 1987). The Ninth Circuit remanded the matter to this Court to determine whether the Fund violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1381, in other respects.

29 U.S.C. § 1054(g)(1)

The pension plan at issue provided for retroactive benefits based upon past service credits and increases in an employer's contribution rate. Under the contribution rate method of granting retroactive benefits, if an employer increased its contribution rate, all pension benefits would be calculated using that increased rate, even though all benefits had accumulated at lower rates. However, in section 2.10, the plan specified that these retroactive benefits would be eliminated if doing so were necessary to preserve the actuarial soundness of the Fund.[1]

The plaintiffs assert that application of section 2.10 violated 29 U.S.C. § 1054(g) which prohibits pension plan amendments that decrease accrued benefits without prior approvel of the Secretary of Labor. The defendant con-

[1] Section 2.10 reads as follows:

> Section 2.10. Contribution Rate Increases. The Trustees reserve the right to reduce the portion of the pension which is attributable to any increase in the contribution rate which increase was agreed upon subsequent to the original Collective Bargaining Agreement providing for contributions to the Fund in order to preserve an actuarially sound relationship between the contributions anticipated from the particular Employer as a result of said increased contribution rate and the projected benefits to be paid to Participants of the Employer as a result thereof.

tends that this provision does not apply for two reasons: the plan was not amended and the benefits were not accrued.

The Fund states that its use of section 2.10 was merely an application of an existing plan provision, not an amendment to the plan. It cites *Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552, 1561 (D.C. Cir 1984), *cert. denied*, 105 S. Ct. 127 (1984), in support of its position. That case specifically held that trustees' use of a plan provision to change benefits does not amount to a plan amendment. Indeed, the court noted that "[u]nder [the plaintiffs'] construction, reducing *any* benefits, authorized by the plan, of persons whose rights are vested, would constitute an 'amendment.'" *Id.* (emphasis in original)

The plaintiffs retort that section 2.10 must be an amendment because in *Fentron Industries, Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1306 (9th Cir. 1982) ("Fentron I"), the Ninth Circuit held that the trustees' use of section 2.09, which permits elimination of past service benefits, was an amendment. However, this argument does not recognize the historical differences between the two sections. Section 2.09 was not part of the 1969 collective bargaining agreement; the provision was added in the 1976 plan. Thus, it was an amendment and the court held that application of the provision violated 29 U.S.C. § 1053(c)(1)(B) which requires the plan to permit vested current or former employees to have their pension benefits computed under the original method if the amendments to the plan would decrease their benefits. *Id.* In this case, the plaintiffs admit that section 2.10 was *not* added to the pension plan after the plaintiffs' benefits vested. Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 19 (filed March 8, 1985). Their argument that use of the

section must be an amendment because the Fentron I court stated that the trustees amended the 1969 plan to conform with the newly enacted ERISA in 1976 does not support the plaintiffs' contention that section 2.10 was added to the plan after they had vested rights to pension benefis calculated using higher contribution rates. The plaintiffs also argue that use of section 2.10 was an amendment because the Ninth Circuit in Fentron I "recognized that the application of section 2.09 was a plan amendment." That statement is incorrect. The Fentron court held that section 2.09 was an amendment because it was added to the pension plan after the plaintiffs' rights vested, not because it was employed to decrease the plaintiffs' benefits. *Fentron*, 674 F.2d at 1306.

Application of the section also did not decrease accrued benefits. The definition of "accrued benefit" was recently discussed in *Shaw v. International Association of Machinists and Aerospace Workers Pension Plan*, 750 F.2d 1458 (9th Cir. 1985). The Court noted that ERISA's definition of accrued benefits is not very helpful. For this type of plan, ERISA defines accrued benefits as "the individual's accrued benefit determined under the plan . . . expressed in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23). However, the court observed that the definition references the plan provisions and noted that courts generally do not find that unfunded and contingent benefits are accrued. *Shaw*, 750 F.2d at 1463-64. Through section 2.10, the plan makes retroactive benefits based upon increases in contribution rates contingent upon the continued financial soundness of the fund. Those benefits are also unfunded. Thus, such benefits are not accrued or non-forfeitable.

Accordingly, the use of section 2.10 was not a plan amendment, did not decrease accrued benefits, and, therefore, did not violate 29 U.S.C. § 1054(g)(1).

29 U.S.C. § 185

Section 301 of the Taft-Hartley Act, 29 U.S.C. § 185, grants the United States district courts jurisdiction over suits for violation of contracts between employers and labor organizations. The Supreme Court has also construed that section as providing protection against unilateral decrease in vested pension rights without the consent of the pensioner. *United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562, 575 n.14, 102 S. Ct. 1226, 1234 n.14 (1982); *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20, 92 S. Ct. 383, 398 n.20 (1971).

The parties agree that the pension rights at issue were vested under the plan and that the pensioner's consent was not obtained before the benefits were reduced. Nonetheless, the Fund contends that the Taft-Hartley Act does not create jurisdiction over a dispute between an individual beneficiary of the fund and the fund. That argument must be dismissed based upon clear Ninth Circuit precedent. *See Turner v. Local Union 302, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 604 F.2d 1219, 1224 n.4 (9th Cir. 1979) ("This court has recognized that retirees may sue under § 301 to enforce pension rights."); *Rehmar v. Smith*, 555 F.2d 1362, 1366 (9th Cir. 1976) ("Section 301 jurisdiction is not dependent upon the parties to the suit but rather the nature or subject matter of the action. Jurisdiction exists as long as the suit is for violation of a contract between a union and employer even if neither party is a union or an employer.").

Thus, this Court does have jurisdiction. However, the Fund's discretionary actions may be overturned only if they are arbitrary and capricious. *Rahmar*, 555 F.2d at 1371. For the reasons discussed in the following section, this Court concludes that trustees did act arbitrarily and capriciously and, consequently, violated 29 U.S.C. § 185.

29 U.S.C. § 186(c)(5) and 29 U.S.C. § 1104(a)(1)(A)

The plaintiffs assert that the defendant's application of section 2.10 arbitrary and capricious and therefore violates section 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. § 186(c)(5), and section 404 of ERISA, 29 U.S.C. § 1104. Those sections establish fiduciary duties for the fund trustees, create identical standards of care and subject the defendant's actions to review under the arbitrary and capricious standard. *White v. Distributors Association Warehousemen's Pension Trust*, 751 F.2d 1068, 1071 (9th Cir. 1985); *Elser v. I. A. M. National Pension Fund*, 684 F.2d 648, 654 (9th Cir. 1982).

According to the plaintiff, the Fund trustees acted arbitrarily and capriciously by reducing benefits without showing actuarial necessity for doing so. The Ninth Circuit in *Elser v. I. A. M. National Pension Fund*, 684 F.2d 648, 657-58 (9th Cir. 1982), held that forfeiture provisions may be employed only when needed to protect the actuarial integrity of the fund. This view was reitrated very recently by the Ninth Circuit when it affirmed a district court ruling in which the court invalidated a pension fund's denial of benefits and stated:

> Short of their unsubstantiated claim that a grant of benefits here may deprive a future Pension Plan participant of Trust Fund benefits, they do not demonstrate that the actuarial soundness of the Fund will, in fact, be adversely affected in any way.
>
> There is no doubt that any denial of benefits will help preserve a pension fund's financial resources for remaining and future participants. That, however, does not make denial of benefits appropriate in every case. Otherwise, trustee denials of benefits could never be deemed arbitrary and capricious. *Actuarial principles may serve to defeat benefits only if the overall financial stability of the pension plan is endangered.*

Burditt v. Western Growers Pension Plan, 636 F. Supp. 1491, 1497 (C.D. Cal. 1986), *aff'd*, 818 F.2d 698 (9th Cir. 1987) (emphasis added, citations omitted).

If the plaintiffs show that use of the forfeiture provision leads to arbitrary and capricious results, the Fund must come forward with evidence that use of the provision was necessary to preserve the integrity of the Fund as a whole. Certainly, application of the provision has led to arbitrary results. For example, a person who worked for a contributing employer other than Fentron and who spent ten years working when the employer contributed $.20 per hour to the pension fund and one year working when the employer contributed $.35 per hour would have his entire pension calculated at the $.35 rate. In contrast, a Fentron employee who worked for ten years at the $.20 contribution rate and one year at the $.35 rate would receive the bulk of his pension at the $.20 rate. Hence, the Fentron employee would receive much lower benefits than the other employee even though they were similarly situated.

The Court views the trustees' use of section 2.10 to reduce the Fentron employees' benefits as especially arbitrary and capricious because this was the only instance in which the trustees used section 2.10 to decrease the benefits of a withdrawing employer's employees. Levy Deposition at 115.19-115.22. The arbitrariness of this retroactive cancellation of benefits is further underscored by the fact that some of the plaintiffs had been receiving benefits for some time before the Fund applied section 2.10 to reduce the benefits. Once retired, an individual who loses expected benefits is not able to do much about that loss. Furthermore, there is an inherent arbitrary and capricious aspect to decreasing pension benefits once a person's right to those benefits has vested and the individual relies on receiving them.

Because the Fund's use of section 2.10 is arbitrary and capricious, it can be upheld only if the Fund demon-

strates that its application of the section was necessary to maintain the financial integrity of the Fund as a whole. It is uncontroverted that the Fund never presented any evidence showing actuarial need for its use of section 2.10. *See* Dudovitz Declaration, Exhibit 2 (Fund does not contend that actuarial soundness of the Fund as a whole was dependent upon application of section 2.10 to Fentron employees); Exhibit 6, 95.21-96.7 (Effect of Fentron's withdrawal on Fund's total unfunded liability was not considered relevant to the decision to use section 2.10); Exhibit 7, 45.8-45.11, 89.14-89.21 (Fund actuary did not examine impact of Fentron's withdrawal on the Fund as a whole).

The Fund does not dispute that it did not ground its decision to apply section 2.10 to Fentron employees on an actuarial conclusion that failure to do so would jeopardize the actuarial soundness of the Fund as a whole. It does assert that given this Court's and the Ninth Circuit's prior rulings in this case, this Court could not now conclude that the Fund acted arbitrarily and capriciously. However, neither court has reached the precise contentions now at issue. This Court's earlier rulings only established that the Fund trustees in their individual capacities had some justification for applying section 2.10, and thus the trustees were not subject to personal liability. The Court did not conclude that the Fund demonstrated actuarial necessity for its actions. Indeed, it could not have done so in the fact of the unchallenged information discussed in the previous paragraph.

Furthermore, the Ninth Circuit's prior ruling in *McDaniel v. National Shopmen Pension Fund*, 817 F.2d 1370 (9th Cir. 1987), did not address the issues now raised. The Circuit only determined that the Fund's *interpretation* of section 2.10 was not arbitrary and capricious under 29 U.S.C. § 1104(a)(1)(D). It did not conclude that the Fund's *use* of the section was not arbitrary and capricious under 29 U.S.C. § 1104(a)(1)(A)

(i). The Ninth Circuit could not have addressed the latter issue because this Court had not ruled on it.

Accordingly, the trustees acted arbitrary and capriciously and therefore violated 29 U.S.C. § 186(c)(5) and 29 U.S.C. § 1104(a)(1)(A).

NOTICE REQUIREMENTS

ERISA requires pension funds to prepare summary plan descriptions ("summaries") that include information about "circumstances which may result in disqualification, ineligible, or denial or loss of benefits." 29 U.S.C. § 1022. The fund must furnish each plan participant with a copy of the summary. 29 U.S.C. § 1024(b). The plaintiffs contend that the Fund violated its fiduciary duty by providing an inadequate plan summary.

The trustee supplied a plan summary, but it did not contain any reference to section 2.10 either by name or by content. Pages five and six of the summary discuss how participants may lose pension credit, but do not mention section 2.10. The summary also includes a section entitled "How Much You'll Get" which describes the retroactive grant of benefits based upon new, higher contribution rates, but there is no discussion of section 2.10.

The defendant does not point to any other part of the summary that contains a description of loss benefits through section 2.10. However, the Fund claims that the summary plan requirements did not apply to it in relation to the Fentron employees because Fentron withdrew from the Fund in 1977, which was about one year before ERISA's summary plan requirements came into effect. The plaintiffs correctly note that the summary plan requirements require the Fund to provide summaries to all *participants* in its pension plan. 29 U.S.C. § 1024(b). ERISA defines a "participant" as an employee or former employee who is or may become eligible to receive benefits from a pension plan. 29 U.S.C. § 1002(7). All of

the plaintiffs were "participants" when the plan summary requirement became effective in 1978. Therefore, the Fund was required to provide a proper plan summary to the plaintiffs.

The defendant also claims that its failure to include a description of section 2.10 in the plan summary has not harmed the plaintiffs because the plaintiffs were supplied with the full text of the plan and thus the violation was merely "technical" or procedural. The Ninth Circuit recently upheld a trial court's grant of summary judgment in favor of a plaintiff who claimed that the defendant corporation's pension plan did not comply with ERISA's disclosure requirements. In response to the argument that the error was merely procedural, the Court emphasized the importance of disclosure when it stated, "[a]lthough reporting and disclosure requirements are arguably procedural, it is these procedural requirements that alter the very balance of knowledge and rights . . . ." *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984), *cert. denied*, 106 S. Ct. 183 (1985). Both *Blau* and ERISA stress the importance of disclosure of pension plan provisions in language that is easily understood. The fact that the Fund did supply participants with a copy of the text of the plan is insufficient to allow the Fund to avoid the consequences of not providing all required information in the plan summary. If, after careful study, this Court and the Ninth Circuit found the proper meaning of section 2.10 elusive, and had different interpretations of the section, it cannot be reasonable to expect plan participants to understand the section by simply reading through the plan document. The general public's lack of a sophisticated understanding of contract language is the very reason why Congress included a plan summary requirement in ERISA.

Finally, the defendant claims that the plaintiffs were not harmed by the omission of a section 2.10 discussion in the plan summary. The Court does not agree. Had

the plaintiffs known of the provision, they would have been less likely to rely on expected pension benefits calculated using higher contribution rates and they could have established other sources of retirement income to supplement any loss in benefits. They also could have made their opposition to the provision known during collective bargaining sessions, and they could have urged the trustees not to employ the provision. In addition, the undisputed loss of expected benefits is certainly a harm.

Thus, the Fund violated its fiduciary duties by not providing an adequate plan summary, and the Fund must therefore supply the benefits that it withheld.

Accordingly, the plaintiffs' renewed motion for summary judgent is GRANTED and judgment for the plaintiffs should be entered.

The Clerk of this Court is directed to send uncertified copies of this Order to all counsel of record.

DATED this 29th day of February, 1988.

/s/ John C. Coughenour
JOHN C. COUGHENOUR
United States District Judge

U.S. COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 85-5869

GEORGE STEWART, *et al.*,
Appellants,

v.

NATIONAL SHOPMEN PENSION FUND, *et al.*,
Appellees,

July 25, 1986

Before SCALIA and SILBERMAN, Circuit Judges, and WRIGHT, Senior Circuit Judge.

SILBERMAN, Circuit Judge.

In this suit, appellant employees and retirees challenge their pension fund's decision to cancel service credits they received for employment before their employers joined the fund. Because service credits are a basic factor in determining benefit levels, the cancellation resulted or will result in reductions in the appellants' pensions. The cancellation came in response to the appellants' employers' withdrawal from the fund before contributing enough money to cover the appellants' years of employment prior to enrollment in the fund. The district court granted summary judgment in favor of the pension fund and its trustees, holding that the decision to cancel the credits was not arbitrary and capricious since it served to avoid unfunded pension liability. Appellants argue that the pension fund was obliged to make each cancellation deci-

sion in light of a reexamination of overall "actuarial soundness of the fund" at the time of decision. Because we believe that the trustees' reliance on a general rule designed to preserve the fund's long-term financial stability was reasonable, however, we affirm the district court's decision.

Appellee National Shopmen Pension Fund is a multiemployer pension plan within the meaning of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1002(37)(A) (1982), with over 300 contributing employers and nearly 18,000 participants. Appellants George Stewart and Lee Roy Warren, representatives of a class of some 368 employes and retirees, are contesting one facet of the Fund's method of calculating pension benefits: its treatment of the years a worker has spent with an employer before the employer joined the Fund. Under the terms of the Fund's governing plan, when an employer begins making payments to the Fund, its employees' pension benefits are calculated on the basis of all their years of service with the contributing employer, not merely the years of service after enrollment. Because granting past service credits creates unfunded liabilities, however, the Fund assesses contributions from the enrolling employer that exceed the amount necessary to cover its employees' post-enrollment service alone. This surplus is used to amortize the unfunded past service liability. But an employer withdrawing from the Fund after a short time may not have contributed enough to fund the past service liability incurred on its behalf. To protect the Fund against the withdrawing employer's "dumping" of unfunded liability, Section 2.09 of the Fund's rules permit it to cancel any or all of the past service credits of present and former employes of the withdrawing employer.[1]

[1] Section 2.09 provides:

> If an Employer's participation in the Fund with respect to a bargaining unit or group terminates, the Trustees are em-

In each of the thirty-seven instances in which employers have withdrawn from the Fund since the adoption of Section 2.09 in 1976, the Fund has directed Martin Segal Co., its actuary and consultant, to prepare an analysis of the effect of the withdrawal on the Fund. Each actuarial report calculated both the amount of Fund assets attributable to the withdrawing employer's contributions and the amount of the Fund's pension liability to the withdrawing employer's workers and retirees. Where the report indicated that attributable assets were exceeded by liability, resulting in the dumping of unfunded benefit liabilities on the Fund—which occurred in twenty-three of the thirty-seven employer withdrawals—the Trustees invariably directed that past service credits of the withdrawing employer's workforce be cancelled to the extent necessary to eliminate the unfunded liability. Credits of active employees were always cancelled before credits of retirees.

Appellants' employer, Anchor Post Building Products, Inc., withdrew from the Fund in 1979, when it closed its Baltimore facility and permanently laid off its em-

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powered to cancel any obligation of the Trust Fund that is maintained under the Trust Agreement with respect to that part of any pension for which a person was made eligible on the basis of employment in such bargaining unit or group prior to the Contribution Period with respect to that unit or group. Neither shall the Trustees, Employers, nor the Union be obligated to make such payments.

Such arrangements are permissible by virtue of a provision of ERISA, 29 U.S.C. § 1053(a)(3)(E) (1982). Partial or complete cancellation of past service credits pursuant to Section 2.09 reduces the amount of accrued benefits which employees and retirees receive. Since 1982 this section has not been used by the Fund to affect the vesting of rights to a pension, as a result of an adverse judicial decision. *See Fentron Indus. v. National Shopmen Pension Fund*, 674 F.2d 1300, [3 EBC 1323] (9th Cir. 1982). *See generally Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552, 1556-57 [5 EBC 1518] (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 127 [5 EBC 2192] (1984).

ployees there. Under Anchor Post's collective bargaining agreements, the plant closing terminated its obligation to make contributions to, or participate in, the Fund. When Anchor Post withdrew, the Fund received an actuarial analysis from Martin Segal showing that at termination Anchor Post's allocated share of Fund assets was approximately $300,000 and its vested liabilities were $1,050,000, leaving some $750,000 of unfunded liability dumped on the Fund. This sum represented approximately 1.8% of the Fund's total assets at the time of Anchor Post's withdrawal. Even cancellation of all past service credits of Anchor Post's workers and retirees would still leave nearly $155,000 in unfunded liabilities that the Fund would be required to absorb. Based on these calculations, in March 1980 the Trustees voted to cancel all past service credits of Anchor Post's workers and retirees for purposes of determining benefit amounts. Though no recipient was completely deprived of a pension, the effect on the appellants was considerable. George Stewart, then a 74-year-old retiree, saw his pension reduced from $80 to $9 per month. Lee Roy Warren, a 58-year-old who took early retirement, saw his expected benefits drop from $89 to $45 per month.

After an unsuccessful appeal to the Trustees, Stewart and Warren brought a class action in district court seeking declaratory and injunctive relief on the grounds that the cancellation violated specific procedural requirements of ERISA and, in the alternative, that the Trustees acted arbitrarily and capriciously in cancelling the credits. The district court granted appellants' motion for summary judgment on the former grounds, declining to reach the claim of arbitrary and capricious action. *Stewart v. National Shopmen Pension Fund*, 563 F. Supp. 773 [4 EBC 1680] (D.D.C. 1983). This Court reversed the district court's rulings on the procedural claims and remanded for consideration of the arbitrary and capricious claim. *Stewart v. National Shopmen Pension Fund*, 730 F.2d

1552, 1565-66 [5 EBC 1518] (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 127 [5 EBC 2192] (1984). In that context, we noted that "avoiding the dumping of unfunded liability is a permissible goal of multiemployer pension funds," because "[w]hen a fund is obligated to pay out more money than it has been paid in, and it is unable to recoup the difference, '[t]hese excess benefits would have to come largely from the stepped-up contributions of current participants.'" *Id.* at 1566 (citation omitted). As a result, we concluded that:

> to the extent that cancellation is necessary to avoid the dumping of substantial unfunded liability, it is presumptively reasonable. On remand, the district court should evaluate the evidence to determine whether there was a reasonable actuarial basis for the action of the trustees.

Id. (footnote omitted).

On remand the district court dismissed the suit. The court held that its sole task was to determine whether the Fund's cancellation of past service credits was actually necessary to prevent the dumping of unfunded liability on the Fund; that appellants initially had the burden of showing that "any particular implementation" by the Trustees of the presumptively lawful practice of past service cancellation was arbitrary and capricious, and that appellants had failed to present any evidence to that effect; and that in any event each cancellation of past service credits had a reasonable actuarial basis, because (a) each cancellation was supported by an actuarial study showing that it was necessary to prevent the dumping of unfunded liability on the Fund, and (b) credits were only cancelled to the extent necessary to cure the dumping. *Stewart v. National Shopmen Pension Fund*, No. 82-3055 (July 26, 1985). This appeal followed.

Trustees of pension funds have fiduciary duties to participants and beneficiaries by virtue of Section 302(c)(5)

of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(5) (1982), and Section 404(a) of ERISA, 29 U.S.C. § 1104(a)—(1982). These provisions impose on fund trustees the obligation to take no action which is "arbitrary and capricious in light of all the circumstances involved." *Norton v. I.A.M. Nat'l Pension Fund*, 553 F.2d 1352, 1356 (D.C. Cir. 1977); *Elser v. I.A.M. Nat'l Pension Fund*, 684 F.2d 648, 654 [3 EBC 2155] (9th Cir. 1982), *cert. denied*, 104 S. Ct. 67 [4 EBC 2314] (1983). Judicial review of trustees' actions under this standard, like review under the analogous standard in public administrative law, is strictly limited, taking into account the expertise of professionals operating in a complex field. Courts will substitute their judgment for that of trustees only if the trustees' actions are not grounded on any reasonable basis. Choices between reasonable alternatives, it follows, are for the trustees, not the courts. *See Roark v. Lewis*, 401 F.2d 425, 429 (D.C. Cir. 1968); *see also Music v. Western Conf. of Teamsters Pension Trust Fund*, 712 F.2d 134, 418 (9th Cir. 1983).

Appellants argues that that this Court, by remanding to the district court to determine whether the Trustees' action had a "reasonable actuarial basis, obliged the Fund to prove that cancelling past service credits *in this instance* was necessary to protect the "actuarial soundness" of the Fund. That position both misreads our prior opinion and misapplies our standard of review. By concluding that cancellation of past service credits to avoid dumping of unfunded liability is presumptively reasonable, this Court necessarily concluded that such a rule (or in this case, a practice authorized by a rule) serves ultimately to protect a fund's actuarial soundness: "When a fund is obligated to pay out more money than has been paid in, and it is unable to recoup the difference, '[t]hese excess benefits would have to come largely from the stepped-up contributions of current participants.'" 730 F.2d at 1566 (citation omitted).

Forcing the Fund to prove that such a practice is actually "necessary" to preserve its actuarial soundness, as opposed to merely conducive to that purpose, would impose a virtually impossible burden of proof on the Fund. This is particularly so because the actuarial soundness of a fund is a concept that—unlike a balance sheet—does not refer to a static picture. Rather, it is an estimate of that fund's future prospects based on a number of assumptions which, although made by professionals, are hardly exact. It may well be that, strictly speaking, *no* one rule or practice is indispensable to a fund's actuarial soundness. In any event, the judiciary is neither competent to make such evaluations nor authorized to review a trustee's actions under a test that exceeds the arbitrary and capricious standard. The appellant, in effect, would have this Court abjure our limited standard of review in favor of a test more nearly resembling strict scrutiny. Our cases do not permit such a departure. In short, having held that the Fund's policy of cancelling past service to avoid dumping of unfunded liability is presumptively reasonable, this Court has already implicitly rejected appellants' motion that the Fund is obliged to satisfy a court's independent assessment that the policy is strictly necessary to preserve actuarial soundness.

It follows that the Fund is not obliged to show that its policy's application *to these facts* is justified by the need to protect the actuarial soundness of the Fund. Appellants argue essentially that the Fund should be obliged to prove that it could not "afford" to credit their past service—regardless of the reasonableness of its policy in general and of its uniform application of that policy in the past. To state this argument is to reveal its fundamental weakness: no pension fund could operate pursuant to that kind of *ad hoc*—and inevitably inequitable—decision-making. A trustee's fiduciary duty, after all, extends to *all* a fund's participants. And failure to abide by the past service disregard rule here would amount to granting the appellants a preference not ac-

corded to others. In truth, to accept appellants' argument would be to turn our standard of review on its head and *require* the Fund to act capriciously.

Of course we would have an entirely different case if appellants had shown that the Fund's policy was inconsistently applied. We reject appellants' contention that there was inconsistency in the Fund's practice of refusing to *raise* benefits for employees whose withdrawing employers leave the Fund with surplus contributions. Surpluses of this kind are needed to defray dumped unfunded liabilities (as in this case) which exceed cancellable past service credits.

The district court on remand properly read this Court's prior opinion to limit its inquiry to the question of whether the past service credit cancellaton was necessary in order to avoid dumping of unfunded liability. It was in that sense—indeed, in light of the logic of this Court's opinion it could only be in that sense—that this Court referred to a "reasonable actuarial basis." 730 F.2d at 1566.[2] Indeed, it was the Fund's failure to produce evi-

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[2] This Court did say that cancellation is presumptively reasonable to avoid dumping of "substantial" unfunded liability. The Court's reference to "substantial" liability could be read to imply that an insubstantial dumping would not justify cancellation of past service credits. But we read the reference as descriptive of the facts of this case rather than as stating a limiting rule: that is to say, $750,000 (the amount of unfunded liability that would be dumped if past service credits were not cancelled here) is undoubtedly "substantial." Furthermore, because past service credits are cancelled by the Fund only to the extent necessary to avoid dumping unfunded liability, if the unfunded liability avoided were less than in this case, the impact on beneficiaries would consequently be less also.

Central Tool Co. v. I.A.M. Nat'l Pension Fund, 523 F. Supp. 812 (D.D.C. 1981), *appeals pending*, Nos. 81-2047, -2056 (D.C. Cir.), on which appellants rely, is not inconsistent with our decision here. In that case, the court held that while cancellation of past service credits for purposes of *vesting* was impermissible, cancellation of such credits for purposes of determining benefit levels was appropriate where unfunded liability would otherwise result.

dence that such dumping would result that was the key to *Elser v. I.A.M. Nat'l Pension Fund*, 684 F.2d 648 [3 EBC 2155] (9th Cir. 1982), *cert. denied*, 104 S. Ct. 67 [4 EBC 2314] (1983), upon which appellants rely and which this Court itself cited in its previous opinion. Since in this case the Fund's evidence of dumping is undisputed, that is the end of the matter.[3]

The judgment of the district court is therefore

Affirmed.

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[3] Appellants also briefly argue that retirees' vested pension rights may not be altered without their consent, claiming that it is a *per se* breach of contract under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 (1982), to alter the benefits of one who has already retired and can do little to protect his or her position. This claim was not asserted in the Complaint filed below nor otherwise raised in the district court. It would be inappropriate for us to consider this question in these circumstances. *See District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984).

No. 89-1317

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In The

Supreme Court of the United States

October Term, 1989

NATIONAL SHOPMEN PENSION FUND,

Petitioner,

v.

REUBEN McDANIEL, JOE P. MARTIN, EILEEN HERRALA, JOSEPH GUENTHER, AND HENRY MOSER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts were correct in prohibiting pension fund trustees from reducing vested pensions when the trustees failed to present evidence to support the need for cutbacks.

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In The

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No. 89-1317

NATIONAL SHOPMEN PENSION FUND,

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. In 1977, the National Shopmen Pension Fund (Fund) refused to accept pension contributions from Fentron Industries of Seattle (Fentron) after expiration of a collective bargaining agreement between Fentron and the local shopmen's union. *Fentron Industries, Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1302 (9th Cir. 1982). The Fund's trustees then applied § 2.09 of their pension plan to eliminate the "past service" credits of Fentron retirees and employees, with the result that they were divested of their pensions. *Id.* at 1303. In the ensuing lawsuit, the district court enjoined the Fund's action on

the ground that the application of § 2.09 impermissibly deprived the retirees and employees of vested rights under the Employee Retirement Income Security Act of 1974 (ERISA), and the court of appeals affirmed. *Fentron Industries, Inc. v. National Shopmen Pension Fund*, 2 E.B.C. 1121 (W.D.Wash. 1981), aff'd, 674 F.2d 1300 (9th Cir. 1982). The Fund did not seek review of that decision.

In the meantime, Congress had passed the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub.L. No. 96-364, 94 Stat. 1208, which required employers withdrawing from a pension plan to fund a proportionate share of unfunded liabilities. Its purpose was to protect pension funds from actuarial risks caused by a series of withdrawing employers. Unfazed by this development, the trustees, after the *Fentron* appellate ruling, applied another plan provision, § 2.10. Application of this provision, which the trustees had never used in the context of withdrawing employers (Pet. App. 30a), reduced pension benefits to Fentron employees and retirees by lowering the benefit rate. In deciding to employ it, the trustees relied solely on the determination that Fentron's withdrawal had created a liability, without attempting to determine the effect of that liability on the fund's financial integrity. Pet. App. 31a.

2. The predictable response was this successor litigation, in which the class of about ninety employees, retirees, and their survivors (Pet. App. 6a) challenged the use of § 2.10 on a variety of grounds. In 1985, the district court ruled in their favor on one contention, holding that the language of § 2.10 limited its application to discrete circumstances which did not include instances of withdrawing employers. Pet. App. 6a-13a. The court's injunction restored full benefits to the class members, retroactive to September 1982, the point at which the trustees had applied § 2.10. The Ninth Circuit reversed, however, holding that, although the retirees' reading was "logical and highly persuasive" (Pet. App. 19a), it was "not unreasonable" to construe § 2.10 to apply in situations involving employers who ceased to contribute. Pet. App. 23a.

3. On remand, the district court held that the trustees' application of § 2.10 was in conflict with federal law in three other separate ways: 1) by unilaterally decreasing retirees' vested pensions, the trustees violated § 301 of the Taft-Hartley Act, 29 U.S.C. § 185; 2) by failing to provide a summary plan description informing participants of the potential application and effect of § 2.10, the trustees violated their fiduciary duties under ERISA; and 3) by failing to demonstrate that their arbitrary and capricious conduct "was necessary to maintain the financial integrity of the Fund as a whole," the trustees violated § 302(c)(5) of the Taft-Hartley Act and § 404(a)(1) of ERISA, 29 U.S.C. §§ 186(c)(5), 1104(a)(1). Pet. App. 28a-34a. The judge did agree with the trustees, however, that their action did not violate 29 U.S.C. § 1054(g), which prohibits plan amendments decreasing accrued benefits without approval from the Secretary of Labor. Pet. App. 25a-27a.

4. On the Fund's appeal, the court of appeals did not reach all four of these issues. Instead, it affirmed solely on the claim that the trustees had failed to present an actuarial need for their action. Pet. App. 3a-4a.

Relying on two previous decisions where it had reached a similar conclusion, the court, in a unanimous *per curiam* decision, reiterated that "a multiemployer fund seeking to apply its pension forfeiture provisions must demonstrate that the overall financial stability of the plan is endangered." Pet. App. 4a. In this case, "the record contains no evidence that unfunded obligations to Fentron's employees threatened the financial integrity of the Fund." Pet. App. 4a. Moreover, the court noted that passage of MPPAA "protects funds from having unfunded liabilities dumped upon them by departing employers," so that the trustees here could not contend that their actions were necessary to discourage other employers from withdrawing. Pet. App. 4a.

On November 20, 1989, the panel unanimously denied the trustees' request for rehearing, and no members of the panel or of the court as a whole requested a vote on the suggestion for rehearing *en banc*. Pet. App. 5a.

REASONS FOR DENYING THE WRIT

I. THE FUND MISSTATES THE NATURE OF THE HOLDING BELOW, WHICH PRESENTS NO GROUNDS FOR REVIEW

In an effort to suggest a compelling need for this Court's review, the Fund consistently misstates the nature of the holding below. It begins by contending in the Question Presented that the court of appeals' analysis requires a finding adverse to the trustees "unless the Trustees prove that the plan would become 'financially unstable' but for the specific application [of the plan provision]." Pet. i. Throughout the petition, the Fund describes the decision below in the same terms, using the expression "financially unstable" with such talismanic fervor as to suggest that it was the linchpin of the decision below.[1] The court's alleged approach, the Fund concludes, represents "an entirely new standard of judicial review." Pet. 15.

Neither the Fund's synopsis of the court of appeals' holding nor the conclusion as to its alleged significance is accurate. The Ninth Circuit did not remotely imply that "the enforcement of a plan rule that results in the reduction or loss of benefits may occur *only* if the fund would become financially unstable but for the specific application of the rule." Pet. 21 (emphasis in original). Furthermore, the court's holding does not establish a "new standard of judicial review."

Rather, the court of appeals, carefully following precedent directly on point and recently reiterated, offered this as the standard by which the trustees' action in

---

[1] The words "financially unstable" never appear in the lower court's opinion, but the Fund employs that expression, usually in quotes, on seven occasions. Pet. i, 14, 21 (twice), 23, 27 (twice).

reducing retirement benefits should be judged: "[A] multiemployer fund seeking to apply its pension forfeiture provisions must demonstrate that the overall financial stability of the plan is endangered." Pet. App. 4a. Demonstrating that the Fund's "overall financial stability" is "endangered" is a considerably less onerous burden than demonstrating that Fentron's action itself would have "caused the plan to become financially unstable," as the Fund's version of the Ninth Circuit's standard would require. Pet. 14.

Since the Fund defines "financially unstable" to mean "actuarially insolvent",[2] it is accusing the appellate court of establishing a standard which allows the trustees to prevail only if they can demonstrate a causal link between the employer's withdrawal and the demise of the Fund. Not surprisingly, the Fund finds this approach astonishing, unsupportable, and worthy of strong imagery:

> The Ninth Circuit's requirement that trustees wait until *a fiscal catastrophe has actually occurred* before they may take remedial steps simply defies common sense. It is equivalent to prohibiting a physician from treating a hemorrhaging patient until after the patient has died from loss of blood.

Pet. 25 (emphasis supplied).

This view is inaccurate. The lower courts in this case applied a long-standing principle for reviewing trustees' satisfaction of their fiduciary duties,[3] using a typical standard for a benefit cutback situation.[4] Once the retirees

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[2] Pet. 14 n.19; see also, *e.g.*, Pet. 23 (using "financially unstable" and "actuarially insolvent" interchangeably in consecutive sentences).

[3] See, *e.g.*, *Roark v. Lewis*, 401 F.2d 425, 429 (D.C.Cir. 1968) ("the burden is on the trustees to show some rational nexus between the Fund's purpose and the requirement").

[4] See *Deak v. Masters, Mates & Pilots Pension Plan*, 821 F.2d 572, 578 (11th Cir. 1987), cert. denied, 108 S.Ct. 698 (1988);

(Continued on following page)

established that the reduction in benefits was arbitrary and capricious (Pet. App. 30a), the Fund had the opportunity to justify those retirement reductions by proving that they were needed in order to counter a threat to the Fund's overall actuarial soundness. The Fund's only proffered evidence, however, was to show that some liability was created by the cessation of Fentron's contributions. Pet. App. 30a.

That alone is insufficient, for it proves nothing about the impact of Fentron's withdrawal on the Fund's financial integrity. As the district court observed, the trustees never "contend[ed] that [the] actuarial soundness of the Fund as a whole was dependent upon application of section 2.10 to Fentron employees." Pet. App. 31a; see also Pet. App. 4a. Indeed, the Fund's actuary testified that its unfunded liability significantly *decreased* in the years between Fentron's withdrawal and the application of § 2.10, and was relatively low for funds of comparable size at the time of the application.[5]

The district court and court of appeals applied traditional principles in a logical manner. To borrow from the Fund's colorful anthropomorphic analogy: the standard followed by the courts below is that the doctor should not amputate when the wound is healing on its own.

(Continued from previous page)

Chambless v. Masters, Mates & Pilots Pension Plan, 772 F.2d 1032, 1038 (2d Cir. 1985), cert. denied, 475 U.S. 1012 (1986); *Elser v. I.A.M. National Pension Fund*, 684 F.2d 648, 657 (9th Cir. 1982), cert. denied, 464 U.S. 813 (1983).

[5] Deposition of Thomas Levy, at 40.7-40.10, 44.1-44.5, taken on January 24, 1985 in *McDaniel v. National Shopmen Pension Fund*, No. C83-1484C (W.D.Wash.).

II. DIFFERENT QUESTIONS IMPLICATING DIFFERENT STANDARDS WERE RAISED IN *STEWART* AND *McDANIEL*

The Fund places considerable reliance on the alleged split in the circuits between the decision below and *Stewart v. National Shopmen Pension Fund*, 795 F.2d 1079 (D.C.Cir. 1986). There are significant differences between the cases, however, which indicate that different questions were posed to the two courts, producing variations in the analyses.

1. Although the Fund acknowledges that different plan rules were at issue in the two cases (Pet. 21 n.29), it fails to recognize the significance of that point. In addition to the disparate circumstances in which §§ 2.09 and 2.10 are usually invoked, the consequences of the two rules are considerably different. The former allows the trustees to eliminate past service credits, while "[s]ection 2.10 . . . empowers the Trustees to scale back the benefit level associated with an earlier (lower) contribution rate. . . ." Pet. 8.

This distinction is crucial because the right to eliminate past service credits, at issue in *Stewart*, is expressly permitted by ERISA, 29 U.S.C. § 1053(a)(3)(E)(i). By contrast, there is no authority in ERISA for reducing benefit levels, which was the action taken here.

The Fund emphasizes the purportedly complementary nature of the two plan provisions, claiming that both were intended to resolve problems caused when plans provide "retroactive benefits [which are] unearned." Pet. 5-6. It correctly observes that the law does not require a plan to provide either of these "retroactive benefits" (past service credits or higher benefit levels for earlier work periods). Pet. 6. But the Fund ignores the fact that, once such benefits are provided, ERISA authorizes eliminating or cutting back only one of these "unearned" benefits. Thus, while the Fund notes the similar goals of its two cutback provisions, it overlooks that those rules have irreconcilable statutory authorizations.

In his *Stewart* decision, Judge Silberman implied that *only* cutbacks authorized by ERISA are permitted: after quoting § 2.09, he observed that "[s]uch arrangements are permissible by virtue of a provision of ERISA, 29 U.S.C. § 1053(a)(3)(E) (1982)." Pet. App. 37a n.1. At the very least, the fact that one cutback mechanism is expressly permitted by the authorizing statute, while the other is not, suggests the propriety of applying different fiduciary standards when trustees invoke their discretion to employ different reduction rules.

Since ERISA explicitly allows trustees not to recognize past service credits in appropriate circumstances, it is not unreasonable to allow trustees considerable leeway in implementing such cutbacks. But, when the reduction is not authorized by ERISA's specific provisions, it is compatible with the statute's fiduciary obligations to require trustees to demonstrate the actuarial necessity for the action. Because Congress has spoken directly on the propriety of one type of cutback, while remaining silent on another, the minimum conclusion is that basic fiduciary obligations must be satisfied before the latter action may be undertaken.

The standards of fiduciary duty applied by the court below and the *Stewart* court comport with that approach. Faced with different ERISA scenarios, the courts did not respond erratically.[6]

2. The other distinction between *Stewart* and *McDaniel* is a factual one to which Judge Silberman alluded. He noted that *Stewart* "would have [been] an entirely different case if [the retirees] had shown that the Fund's policy was inconsistently applied." Pet. App. 42a. In this case, inconsistency was a hallmark of the trustees' action.

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[6] This Court has recently examined the nature of fiduciary obligation imposed on plan trustees by ERISA. *Firestone Tire and Rubber Co. v. Bruch*, 109 S.Ct. 948, 953-956 (1989). The court below was simply applying the relevant fiduciary rules to the trustees in this case.

That inconsistency inheres in the novel application of § 2.10 to the *McDaniel* class members. The district court emphasized this point:

> [T]he trustees' use of section 2.10 to reduce the Fentron employees' benefits [is] especially arbitrary and capricious because this was the only instance in which the trustees used section 2.10 to decrease the benefits of a withdrawing employer's employees.

Pet. App. 30a; see also Pet. App. 9a (original district court decision); Pet. App. 22a (original court of appeals decision).

Although the original *McDaniel* appellate decision established that § 2.10 could be interpreted to apply in instances of withdrawing employers, the language of the rule strongly suggests that its drafters never contemplated its application to that situation. See Pet. 8 & nn.10,11; Pet. App. 9a-10a (original district court decision explaining why § 2.10 appeared not applicable to withdrawing employers). Thus, the trustees have applied a rule which was apparently drafted with other considerations in mind and which had never before (and, as far as is known, has never since) been employed in this context.

That the rule could conceivably be stretched to cover this situation does not suggest that, when it is used in this extraordinary manner, the trustees have unbridled discretion. In *Stewart*, § 2.09 was employed in the circumstance for which it was designed. But, here, the unprecedented use of § 2.10 indicates precisely the kind of inconsistent application to which Judge Silberman was alluding. Given that deviation, it is entirely appropriate to apply a somewhat more demanding standard of fiduciary obligation.

The two cases raise different legal questions in different factual settings. That the court below exacted a higher degree of fiduciary obligation does not describe a split in the circuits, but merely reflects those differences.

III. THIS UNUSUAL SITUATION IS NOT DESERVING OF SUPREME COURT REVIEW

1. This situation will not be repeated. After Fentron's cessation of contributions, Congress passed MPPAA, which, as the court below explained, requires

> employers who withdraw from multiemployer funds . . . to fund their proportionate share of the plan's unfunded benefit obligations. By requiring employers to make up any shortfall in contributions when they withdraw from a pension fund, the 1981 legislation protects funds from having unfunded liabilities dumped upon them by departing employers.

Pet. App. 4a (citation omitted). Fentron itself could not be affected by this legislation, which was not retroactive, but MPPAA does render it extremely unlikely that future withdrawals will cause unfunded liabilities. Consequently, the decision below, even if it did create a split in the circuits, will not have a prospective effect; pension funds will have no need to reduce retirees' benefits, for the liability will fall where it should, on the withdrawing employer.

The Fund contends, however, that MPPAA's impact is minor, premising its argument on unsupported allegations about employers' inability to satisfy their withdrawal liability. Pet. 24-25. It offers no factual basis in the record for this contention; to the contrary, it is left to speculate about "another large [withdrawing] employer . . . from whom withdrawal liability *might* well prove uncollectible. . . ." Pet. 25 (emphasis supplied). In short, there is no evidence that a significant number of withdrawing employers are or will be unable to satisfy their obligations, and, accordingly, no indication that MPPAA has failed in its object of placing the burden of unfunded liabilities on the withdrawing employers.

Moreover, even if the Fund's unsubstantiated allegations about MPPAA's effect had some factual basis, this is not the appropriate case for considering the issue. The Fund's attempt to undercut the impact of MPPAA is

premised on withdrawing employers who "have ceased to be economically viable." Pet. 24. But there is no suggestion that Fentron was in that position; its withdrawal was occasioned by other factors. If the Court wishes to consider the proper scope of trustee reaction to bankrupt withdrawing employers, it should review a case with that fact pattern.

In light of MPPAA, it is impossible for a solvent withdrawing employer to avoid paying its share of a plan's unfunded liabilities. As a result, this case will definitely not reoccur, and it is therefore an inappropriate vehicle for resolving the issue raised by the Fund.

2. This petition is the culmination of events which began thirteen years ago, when, in the course of a labor dispute (Pet. App. 7a), the Fund chose not to accept further contributions from a previously contributing employer. Thus, a disagreement between the employer and the union led to the pension fund attempting to eliminate the vested pension rights of the employer's work force.

The instant case is the continuation of the lawsuit filed in January 1979 to challenge that action; on three occasions, the district court has ruled in the retirees' favor, and, on two of the Fund's three appeals, the court of appeals has agreed. As a consequence of this protracted dispute, the 90-odd class members have received all of their benefits – but never with the assurance that the matter had been resolved and that the Fund could not seek to recover the benefits paid out.

Granting the petition would delay resolution of the issue decided below for another year. Moreover, the court of appeals has yet even to consider three more claims resolved by the district court, so that, even if this Court were to rule adversely to the retirees, the matter could drag on for years more. No purpose is served by perpetuating it.

The time has come for this litigation to be terminated, so that the uncertainty which has plagued these elderly workers and their survivors for well over a decade may be concluded. Even if the Fund could muster a more

compelling argument for review, it would still be appropriate to deny the petition. The Fund has grasped every opportunity to deprive Fentron retirees of their benefits, but it has been repeatedly rebuffed. The matter should now be brought to a close.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 1990

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL SHOPMEN PENSION FUND,

Petitioner,

v.

REUBEN MCDANIEL, JOE P. MARTIN, EILEEN HERRALA, JOSEPH GUENTHER, AND HENRY MOSER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF THE NATIONAL ROOFING INDUSTRY PENSION FUND FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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The National Roofing Industry Pension Fund ("Pension Fund") hereby respectfully moves for leave to file a brief as *amicus curiae* in this case in support of petitioner, as provided in Rule 37 of the Rules of this Court. The consent of the attorney for the petitioner has been obtained. The consent of the attorneys for respondents was requested but refused.

The Pension Fund is a national multiemployer pension fund under the Employee Retirement Income Security Act ("ERISA") of 1974, as amended §§ 2 et seq., 29 U.S.C. §§ 1001 et seq. (1985), which is maintained pursuant to numerous collective bargaining agreements and which provides benefits

to participants in multiple states throughout the United States. The Pension Fund is in no way affiliated with petitioner National Shopmen Pension Fund. However, the basic issue proposed by this case is of great concern to all employee benefit plans under ERISA and, in particular, multiemployer plans. Specifically, the Pension Fund represents approximately 21,000 employees who would be directly affected by the Court's decision regarding this issue. The basic issue presented in this case is what is the standard for reviewing the application of a pension plan provision which does not violate any express statutory mandate and which results in a loss or reduction of benefits. Because ERISA mandates that fiduciaries apply plan rules and regulations in a consistent and nondiscriminatory manner, this issue has implications extending far beyond the particular situation now before the Court and, in particular, for national plans such as the Pension Fund. Fiduciaries of national pension plans daily make decisions that may now be second-guessed under a far more strict standard of review if the decision of the Ninth Circuit is allowed to stand. Accordingly, as a national multiemployer pension plan under ERISA, the Pension Fund desires the opportunity to present its views on the matter to this Court.

Petitioners will necessarily concentrate on particular facts of their own case. In the brief tendered with this Motion, the Pension Fund addresses how the Ninth Circuit's decision will affect the administration of national pension plans. Specifically, we emphasize legislative history and general implications of the decision which we believe the Court should take into account. We believe that our contributions should assist the Court in considering the issue in a broader context as to its effect on employee benefit plans throughout the country.

WHEREFORE, the Pension Fund respectfully requests that it be granted leave to file the accompanying brief *amicus curiae* in support of petitioner National Shopmen Pension Fund.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

The interest of the National Roofing Industry Pension Fund ("Pension Fund") is set forth in the accompanying Motion for Leave to File Brief as *Amicus Curiae* in support of the petitioner National Shopmen Pension Fund.

SUMMARY OF ARGUMENTS

The Ninth Circuit's decision below, reported as *McDaniel* v. *National Shopmen Pension Fund*, 889 F.2d 804 (9th Cir.

1989), regarding the standard for reviewing the application of pension plan provisions which do not violate an express ERISA mandate and which result in a loss or reduction of benefits conflicts with a decision from the Court of Appeals for the District of Columbia Circuit; such a conflict impedes the ability of a plan administrator or fiduciary to apply and interpret such plan provisions in a consistent and nondiscriminatory manner as mandated by ERISA. This conflict must be resolved in order for plan administrators and fiduciaries to apply plan provisions consistently and to predict the legality of proposed actions.

The Ninth Circuit's decision below regarding the standard of review is erroneous. The Ninth Circuit's decision holds that the application of a pension plan provision which is not mandated by ERISA and which results in a loss or reduction of benefits is arbitrary and capricious unless the overall financial stability of the plan is endangered. Because this standard ignores the reasonableness of such a plan provision and whether its application promotes a reasonable purpose, the Ninth Circuit's decision should be reversed and a standard of review which considers the reasonableness of such a provision and whether its application promotes a reasonable purpose should be adopted.

ARGUMENTS

I. The Conflicting Circuit Court Decisions Interfere with the Ability of a Fiduciary to Apply Plan Provisions Uniformly and to Predict the Legality of Proposed Actions.

The Court of Appeals for the District of Columbia Circuit in *Stewart* v. *National Shopmen Pension Fund*, 795 F.2d 1079 (D.C. Cir. 1986), held that a pension fund under ERISA seeking to apply a plan provision which does not violate an ERISA mandate and which results in a loss or a reduction of

benefits must prove that such a provision has a reasonable purpose and that the application of the provision will promote that purpose. *Id.* at 1083. If the pension fund cannot prove that the purpose of the provision is reasonable and that its application promotes this purpose, the application of such a provision is arbitrary and capricious. *Id.* However, in its decision below, the Court of Appeals for the Ninth Circuit held that a multiemployer pension fund seeking to apply a pension plan provision which does not violate an express ERISA mandate and which results in a loss or reduction of benefits must demonstrate that the overall financial stability of the plan is endangered. If the pension fund fails to prove that the financial stability of the plan is endangered, the application of such a provision is arbitrary and capricious. The Ninth Circuit's decision in effect disregards the reasonableness of such a plan provision and creates a far more strict standard of review, which is essentially a *per se* rule. The Ninth Circuit expressly noted that its decision "is in apparent conflict with the D.C. Circuit." *McDaniel*, 889 F.2d at 805 n.2.

The Pension Fund is a national pension fund and, as such, it has plan participants who reside in different circuits. ERISA requires plan administrators and fiduciaries to apply plan rules and regulations in a consistent and nondiscriminatory manner. *See* ERISA § 404, 29 U.S.C. § 1104 (1985) (a fiduciary shall discharge his duties solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries). However, the conflicting circuit court decisions regarding the standard of review interfere with the uniform application of plan provisions. As the Court in *Stewart* noted, a fiduciary's duty "extends to *all* . . . participants." *Stewart*, 795 F.2d at 1084 (emphasis original). An administrator's failure to reduce benefits to some participants as required by a plan provision, which is intended to protect the plan's assets, may

result in a grant of a preference to some participants that is not available to other participants. *Id.*

Furthermore, in enacting ERISA, Congress intended to provide uniform laws governing pension plans and to allow plan administrators and fiduciaries to predict the legality of proposed actions. *See* H. R. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4650; S.Rep. No. 127, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4865. However, this conflict among the circuits regarding the standard of review creates an uncertainty as to the legality of proposed administrative actions because administrative actions are considered under a far more strict standard of review in the Ninth Circuit than in the District of Columbia Circuit. This uncertainty as to the legality of proposed actions may detrimentally affect plan participants because some participants may receive a preference not accorded to other participants. This uncertainty may also result in a reluctance by pension plan fiduciaries to enforce plan provisions and, thereby, subject such plan fiduciaries to personal liability and civil penalties under ERISA for a breach of fiduciary duty for failure to follow plan documents. ERISA §§ 404(a)(1)(D) and 409, 29 U.S.C. §§ 1104(a)(1)(D) and 1109 (1985); Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-166, 103 Stat. 1159 (to be codified at ERISA § 502(1), 29 U.S.C. § 1132(1)). Therefore, this Court's consideration of the standard of review in this matter is necessary for plan administrators and fiduciaries to consistently apply plan provisions and predict the legality of proposed actions.

II. The Ninth Circuit's Decision Regarding the Standard for Reviewing the Application of a Pension Plan Provision Which does not Violate an Express Statutory Mandate and Which Results in a Loss or Reduction of Benefits is Erroneous Because it does not Consider the Reasonableness of Such a Provision.

In light of the conflict and the *per se* standard created by the Ninth Circuit's decision below, it is appropriate for this Court to review this matter. ERISA and its legislative history do not provide clear guidelines as to the standard for reviewing the application of pension plan provisions which are not mandated by ERISA and which result in a loss or reduction of benefits. This Court has held that given the language and history of ERISA courts are to develop a "federal common law of rights and obligations under ERISA-regulated plans." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 56, 107 S.Ct. 1549, 1558, 95 L.Ed. 2d 39, 53 (1987). Therefore, because this Court has not expressly considered the standard for reviewing the application of such plan provisions, the issue presented in this matter gives the Court an opportunity to provide clear guidelines as to the applicable standard of review.

An appropriate standard for reviewing the application of such pension plan provisions would be analogous to the standard applied by this Court in *Firestone Tire and Rubber Co.* v. *Bruch*, __ U.S. __, 109 S. Ct. 948, 103 L.Ed. 80 (1989). In *Firestone*, this Court held that if a benefit plan provides the administrator or fiduciary with discretionary authority to determine eligibility for benefits or construe the terms of the plan the administrator's or fiduciary's determination shall be reviewed under the abuse of discretion standard. *Firestone*, 109 S. Ct. at 956. Although the decision in *Firestone* does not address the standard of review presented in this matter, this Court's statements regarding the standard of review in

Firestone provide some guidance. In *Firestone*, this Court stated that ERISA's statutory language and legislative history confirm that the principals of trust law are to be incorporated into ERISA's fiduciary responsibility provisions. *Id.* at 954. This Court noted that when a trustee is given power to construe ambiguous terms, in such circumstances, the trustee's interpretation will not be disturbed if it is reasonable. *Id.* (citing G. Bogart and G. Bogart, *Law of Trust and Trustees* § 560 pp. 169-171 (rev. 2d ed. 1980)). The underlying reasonableness of a provision and whether its application promotes a reasonable purpose should be likewise considered in reviewing the application of a pension plan provision which is not mandated by ERISA and which results in a loss or reduction of benefits.

A consideration of the reasonableness of such a plan provision is important because plan fiduciaries are generally more aware of the purposes of plan rules and regulations and are more familiar with the needs of their industry than are courts. This is particularly true of multiemployer plans which are collectively bargained. Allowing courts to review pension plan provisions without considering the reasonableness of such provisions in effect allows courts to rewrite a plan.

Therefore, in adopting a standard for reviewing the application plan provisions which are not mandated by ERISA and which result in a loss or a reduction of benefits payable, a standard of review which considers the reasonableness of the provision and whether its application promotes a reasonable purpose should be adopted rather than a *per se* rule which holds that such a provision is arbitrary and capricious unless the financial stability of the plan is endangered. Thus, this Court is urged to review this matter and reverse the Ninth Circuit's decision and adopt the District of Columbia Cir-

cuit's expression of the standard of review for such plan provisions.

Alternatively, the standard for reviewing an interpretation of a plan provision, as expressed in *Firestone*, should be adopted as the standard for reviewing an application of a plan provision which does not violate an ERISA mandate and which results in a loss or reduction of benefits. Reviewing an application of such a plan provision is essentially the same as reviewing an interpretation of a plan provision. Therefore, we urge this Court to reverse and remand the Ninth Circuit's decision for consideration consistent with this Court's Opinion in *Firestone*.

CONCLUSION

For the reasons discussed above, *amicus curiae* National Roofing Industry Pension Fund urges this Court to grant the petitioners request for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and to reverse the Ninth Circuit's decision below.

Respectfully submitted,

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